APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16143
D.C. Nos. CV-99-00335-SPK and CV-01-00412-SPK

MARSHALL KENNETH FLOWERS et al.,
Plaintiffs - Appellants,

v.

UNITED STATES ARMY, 25th Infantry Division, et al.,
Defendants - Appellees.

ORDER

Before: THOMPSON and CALLAHAN, Circuit Judges, and MILLER, District Judge*

The appellants' petition for panel rehearing and petition for rehearing en banc are hereby DENIED.

* The Honorable Jeffrey T. Miller, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-16153
D.C. Nos. CV-99-00335-SPK

[Filed May 3, 2006]

MARSHALL KENNETH FLOWERS; ANNA FLOWERS, Plaintiffs - Appellants,	)
v.	)
UNITED STATES ARMY, 25th Infantry Division; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHL WEILER, Major, Defendants - Appellees.	)

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior Judge, Presiding

MEMORANDUM*

Submitted April 7, 2006**
San Francisco, California

Before: THOMPSON and CALLAHAN, Circuit Judges, and MILLER, District Judge***

Husband and wife Marshall and Anna Flowers appeal *pro se* the district court's dismissal of their claims against the United States Army and the individual Army defendants ("federal defendants"), and grant of summary judgment in favor of Fort Jackson Federal Credit Union and First Hawaiian Bank. The Flowers also challenge various discovery and other procedural rulings made by the district court. We affirm the challenged rulings and deny the Flowers' two pending motions.

1. The Flowers argue that the district court erred in dismissing their claims brought pursuant to the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 *et seq.*, against the federal defendants. The district court based its dismissal on the doctrine enunciated in *Feres v. United States,* 340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152 (1950), which held that service members cannot sue the government

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See FED. R. APP. P. 34(a)(2).

*** The Honorable Jeffrey T. Miller, United States District Judge for the Southern District of California, sitting by designation.

for injuries that "arise out of or are in the course of activity incident to service." We must determine whether the district court had subject-matter jurisdiction over the Flowers' RFPA claims against the federal defendants. *See Dreier v. United States,* 106 F.3d 844, 847 (9th Cir. 1997) ("A motion to dismiss pursuant to the *Feres* doctrine is properly treated as a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction[.]"). We review de novo whether the *Feres* doctrine applies to the facts in the record. *Wilkins v. United States,* 279 F.3d 782, 785 (9th Cir. 2002).

The district court concluded that the Supreme Court's decision in *Feres* bars the Flowers' claims against the federal defendants because those claims would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States. This conclusion is in accord with our case law, which "broadly construes" *Feres* "to immunize the United States and members of the military from *any* suit which may intrude in military affairs, second-guess[] military decisions, or impair[] military discipline." *Zaputil v. Cowgill,* 335 F.3d 885, 887 (9th Cir. 2003) (internal quotation marks omitted) (emphasis and alterations in original). Accordingly, the district court properly dismissed the Flowers' RFPA claims against the federal defendants because those claims implicate the concerns that lie at the heart of the *Feres* doctrine.[1] *Feres,* 340 U.S. at 146; *see also United States v. Johnson,* 481 U.S. 681, 691, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) ("[A] suit based upon service-related activity

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[1] Our determination that *Feres* forecloses subject-matter jurisdiction over the RFPA claims directed at the federal defendants renders moot the Flowers' challenge to the district court's denial of their request for additional discovery from Army officials.

necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.").

2. The Flowers also argue that the district court erred in granting summary judgment to the bank and credit union. We review a grant of summary judgment de novo and may affirm on any basis presented in the record, construing the evidence in the light most favorable to the nonmoving party. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). A grant of summary judgment is appropriate only where the moving party has demonstrated that there is no genuine issue of material fact. *Id.;* FED. R. CIV. P. 56(c). Once the moving party demonstrates the absence of a genuine issue of material fact, the nonmoving party that bears the ultimate burden at trial must show that there is evidence creating a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that the credit union is not liable under the RFPA because the subpoena issued to the credit union satisfies an exception to liability under 12 U.S.C. § 3413(e).[2] There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of the bank or the credit union and the Flowers' claimed damages, and

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[2] The protections of the RFPA do not "apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties." 12 U.S.C. § 3413(e).

nothing suggests that the bank or the credit union acted willfully or intentionally to violate the Flowers' rights under the RFPA. 12 U.S.C. § 3417(a)(3). Furthermore, the Flowers' tort claims against the credit union lack any evidentiary support in the record. We must therefore conclude that the district court did not err in granting summary judgment to the bank and the credit union.

3. The Flowers next contend that the district court abused its discretion in denying their Rule 59(e) motion for reconsideration and in making various discovery and procedural rulings. The district court did not abuse its discretion because the motion failed to set forth any of the allowable grounds for reconsideration. *See* FED. R. CIV. P. 59(e). As to the Flowers' argument that the district court should have permitted them to amend their complaint a third time in order to add a claim challenging the military's search of their residence under the Fourth Amendment, we agree with the district court that such an amendment would have been futile because the proposed claim appears to be barred by the *Feres* doctrine based on the same rationale precluding subject-matter jurisdiction over the Flowers' other claims against the federal defendants. *See Newland v. Dalton,* 81 F.3d 904, 907 (9th Cir. 1996) (holding that "district courts need not accommodate futile amendments"). Further, the Flowers' objection to the withdrawal of their counsel, attorney Brown, is in vain because the record reveals that the Flowers fired Brown. We have considered the Flowers' remaining miscellaneous contentions -- including the Flowers' assertion that the district court improperly considered exhibits that the bank submitted in support of its summary-judgment motion and the Flowers' challenge to a number of the district court's discovery rulings -- and we conclude that they are also without merit.

4. Finally, we deny the Flowers' motions to strike the federal defendants' answering brief and to compel government counsel's compliance with the Federal Rules of Appellate Procedure. The first motion is founded on the false premise that the Department of Justice is not permitted to represent the federal defendants on appeal. While the second motion notes an apparent failure by government counsel to comply with certain procedural rules for serving documents on opposing parties, the Flowers have not demonstrated any injury or prejudice resulting therefrom.

For all of the foregoing reasons, the district court's decisions are **AFFIRMED** and the pending motions are **DENIED**.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed May 11, 2004]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT OF SPECIAL MASTER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES AND NON-TABLE COST (sic)

On March 19, 2004, United States Magistrate Judge Kevin Chang, acting as special master pursuant to L.R. 53.1, issued a special master report recommending that Plaintiffs Marshall and Anna Flowers ("Plaintiffs") be awarded attorneys' fees of $13,500.82 and costs of $3,524.45 against Defendant First Hawaiian Bank ("First Hawaiian"). Plaintiff's filed a motion for reconsideration with Judge Chang, which he denied on April 13, 2004.

Plaintiffs and First Hawaiian have both filed objections pursuant to Fed. R. Civ. P. 53(g)(2) (2003).

Plaintiffs seek additional fees, contending that the fee award was too low. In addition to objecting to the amount of reductions, they also contend that they are prevailing parties not only as to claims against First Hawaiian, but also as to Defendants Fort Jackson Federal Credit Union ("Fort Jackson FCU") and the United States Army. Marshall Flowers also seeks fees for representing his wife.

First Hawaiian also objects, contending that the fee award was too high. It contends that many of Plaintiffs' submissions were inadequately documented, pertained to work against the United States Army, or should not be awarded because of limited success (in April of 2003, First Hawaiian and the Army appropriately admitted liability for a technical violation of the Right to Financial Privacy, leaving the primary issue as Plaintiffs' damages -- an issue upon which First Hawaiian substantially prevailed as the Court ultimately awarded only

$200 in statutory damages and nothing for actual or punitive damages).

The Court reviews factual findings and legal conclusions of a special master de novo. *See* Fed. R. Civ. P. 53(g)(3) & (4). Procedural matters are reviewed for an abuse of discretion. *See* Fed. R. Civ. P. 53(g)(5).

I.

The Court OVERRULES Plaintiffs' objections. Marshall Flowers is not an attorney and is not entitled to attorneys' fees, either for himself or for his wife, even if he was allowed for administrative reasons to speak in limited circumstances on behalf of his wife. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Plaintiffs are not entitled to fees incurred by attorneys for work strictly against Fort Jackson FCU or the Army. Fort Jackson FCU and the Army prevailed on claims brought by Plaintiffs. Plaintiffs recovered no damages against them and achieved no equitable relief. Plaintiffs cannot be considered prevailing parties as to claims against Fort Jackson FCU and the Army. Although the litigation against all three defendants was interrelated and there necessarily was some overlap in fees incurred against all three, upon de novo review, the Court is satisfied that Judge Chang made appropriate reductions in allocations for work against Fort Jackson FCU and the Army, as well as for work that was inadequately documented or was excessive. Indeed, Judge Chang appears to have been quite generous to Plaintiffs in making his fee award, considering the limited extent of relief ($200 in statutory damages) obtained against First Hawaiian.

II.

The Court also OVERRULES First Hawaiian's objections regarding the amount of fees. Upon de novo review, the Court is satisfied that Judge Chang made appropriate reductions to reflect limited success and because of inadequately documented or excessive work. Given the nature of the financial disclosures, some work, even for claims against the Army, was sufficiently intertwined with claims against First Hawaiian. And even if some of the fees were apparently incurred after April 9, 2003 (when Defendant First Hawaiian and the Army admitted liability for technical RFPA violations), Plaintiffs are entitled to a limited portion of those fees incurred in "prevailing" against First Hawaiian. "Success in a lawsuit is not always measured by the formal relief obtained." *Clark v. City of Los Angeles*, 803 F.2d 987, 990 (9th Cir.1986) (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). There need not be a perfect relationship between relief sought and relief obtained. *See e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) ("There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.").

III.

The Court, however, SUSTAINS First Hawaiian's objections to the award of costs to Plaintiffs, insofar as First Hawaiian relies upon its offer of judgment under Fed. R. Civ. P. 68. First Hawaiian made a formal offer of judgment under Rule 68 on April 21, 2003, after it formally admitted to violations of the RFPA. The offer was to allow a total sum of $30,000 to be taken against it inclusive of fees and costs.

Plaintiffs rejected the offer. Plaintiffs ultimately recovered much less than $30,000 ($200 in statutory damages, plus about $14,000 in attorney fees and costs).

Rule 68 provides, in pertinent part that "If the judgment finally obtained by the offeree [Plaintiffs] is not more favorable than the offer [by First Hawaiian], the offeree [Plaintiffs] must pay the costs incurred after the making of the offer." Importantly, the Ninth Circuit (and other circuits) have stressed that "The award [of costs] is mandatory; Rule 68 leaves no room for the court's discretion." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 859 (9th Cir. 1996) (citation omitted); *see also Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997).[1] Under Rule 68, because Plaintiffs did not ultimately obtain a higher judgment than $30,000, they are not entitled to any of their costs as a prevailing party incurred after April 21, 2003. *See Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993) ("Rule 68 precluded the [prevailing party] from recovering

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[1] The Court has also considered reducing the attorneys' fees under Rule 68. If the statute allowing for attorneys' fees (in this case, 12 U.S.C. § 3417(a)(4)) defines "costs" as to include attorneys' fees, then the attorneys' fees would be subject to a similar reduction. *See e.g.*, *Marek v. Chesney*, 473 U.S. 1, 9 (1985) ("Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68"). The RFPA, however, does not include attorney's fees as costs. *See Haworth v. State of Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995) ("unlike attorney fees in a section 1983 action, attorney fees in an FLSA action [like in the RFPA] are not automatically shifted by Rule 68"). Thus, attorney fees claimed by Plaintiffs incurred after April 2003 are not subject to Rule 68's reductions.

that portion of their costs and fees related to work performed after the date of the [Defendant's better] offer").[2]

Similarly, even if the Court were to consider Plaintiffs' "supplemental bill of costs" filed (late) on March 26, 2004, all those costs were incurred after April 2003 and would not be recoverable.

The Court therefore REDUCES the award of costs. Plaintiffs may not recover $1299.49 for the October 29, 2003 and November 20, 2003 deposition charges (invoices for depositions of Leanne Nakasone and Von Dell Waiwaiole-Cabos), $108.33 for tape transcription and binders (incurred on August 26, 2003), and $1604.20 for copying charges. (The Court calculates the charges by reducing for 16042 copies from August 2003 to January 2004, as reflected in Plaintiffs form AO 133 submitted on January 29, 2004, multiplied by 10 cents per copy).

Plaintiffs had claimed a total of 26131 copies on their AO 133. Reducing for 16042 copies leaves 10089 copies. Multiplying 10089 by 10 cents results in a charge of $1008.90 for copies. The Court concludes that this amount should be reduced by 2/3rds because Plaintiffs prevailed against only one of three defendants. This leaves a charge of $336.30 for copies necessarily incurred against First Hawaiian.

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[2] Under Rule 68, Plaintiffs might also have been assessed *First Hawaiian's* post offer costs as well. *See Haworth*, 56 F.3d at 1052 ("Because [defendant] made valid Rule 68 offers of judgment and the final judgment against it was less than the amount offered, the plaintiffs must bear their own costs of suit, as well as [defendant's] costs, incurred after the Rule 68 offers were made."). No request for costs was filed by First Hawaiian.

The cost award is $150 for clerk fees and $336.30 for copies, totaling $486.30.

CONCLUSION

The March 19, 2004, report of the special master is adopted in part and modified in part. Plaintiffs are awarded attorneys' fees of $13,500.82 and costs of $486.30. An amended judgment shall issue in favor of Plaintiffs and against First Hawaiian Bank to reflect the award of fees and costs, as well as statutory damages of $200.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, May 11, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed April 13, 2004]

MARSHALL KENNETH FLOWERS,
Plaintiff,
v.

UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK,
Defendants.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,
v.

DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

ORDER DENYING PLAINTIFFS MARSHALL K. FLOWERS AND ANNA FLOWERS' MOTION FOR RECONSIDERATION

On March 26, 2004, Plaintiffs Marshall K. Flowers and Anna Flowers ("Plaintiffs") filed "Plaintiffs Marshall K. Flowers and Anna Flowers' Motion for Reconsideration of the US Magistrate Judge's Report of the Special Master on Plaintiffs' Motion for Attorney Fees and Non-Taxable Cost" ("Motion"), a Supplemental Bill of Cost and Plaintiffs (sic) Marshall K. Flowers Supplemental Memorandum in Support of Attorney Fees Incurred by Plaintiffs Marshall K. Flowers and Anna Flowers. On April 6, 2004, Defendant First Hawaiian Bank ("Defendant First Hawaiian") filed its Memorandum in Opposition to the Motion and its objections to Plaintiffs' Supplemental Bill of Costs. Plaintiffs seek the reconsideration of the attorneys' fees award in the amount of $13,500.82 and the taxable costs allowed of $3,524.45.

DISCUSSION

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. *See Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1292 (9th Cir. 1982). There is a "compelling interest in the finality of judgments which should not be lightly disregarded." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

It is well settled in the Ninth Circuit that a successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its

prior decision. *See Great Hawaiian Fin. Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987) (citations omitted), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988). Courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. *See id.*, and Rule 60.1 of the Local Rules of Practice for the District of Hawaii ("L.R.").

Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572 (D. Haw. 1988). A party moving for reconsideration cannot merely reargue facts and legal arguments that were previously submitted to the court. *See, e.g., Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1988). Furthermore, reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. *See All Hawaii Tours, Corp. v. Polynesian Cultural Ctr.*, 116 F.R.D. 645, 649-50 (D. Haw. 1987), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988).

Plaintiffs make several arguments for reconsideration, however none of the arguments cite any authority or raise anything which satisfy the requirements for reconsideration of the Report of the Special Master. Plaintiffs do not point to an intervening change in controlling law relevant to the issues addressed in the Report of the Special Master and to the discovery of new evidence that was not previously available. Plaintiffs provide the September 2003 detailed billing statements and a Supplemental Bill of Costs to support their request for reconsideration, but Plaintiffs fail to explain why this information was not or could not have been presented as part of their original motion. Also, with regard to the Court's

denial of the cost incurred by Plaintiff to produce tape recorded transcript of proceedings based on Plaintiffs' failure to attach an invoice, Plaintiffs argue that such information will be provided. Plaintiffs should have produced the subject invoice at the time of the filing of their original Motion for Attorney's Fees.

Plaintiffs argue about or against the fees awarded to Attorney Charles Brown and Attorney Rory Toomey. It is unclear whether Plaintiffs are arguing that the fees should be more or less than the amount awarded. In some instances, Plaintiffs argue that the amount should be increased; in other instances, Plaintiffs argue that the fees are excessive.[1] For example, Plaintiffs argue that the reduction of fees by 95 hours for work in the unsuccessful claim against Fort Jackson Federal Credit Union is incorrect. They cite to the Ninth Circuit decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 975 (9th Cir. 2002) saying that the Ninth Circuit allowed the amendment. However, while the Ninth Circuit allowed the amendment of the Complaint, Plaintiffs still did not prevail on their claims against Fort Jackson Federal Credit Union. See Judgment entered by Judge Samuel P. King on December 8, 2003. Thus, because Plaintiffs are not a prevailing party with regards to Fort Jackson Federal Credit Union, Plaintiffs are not entitled to recover fees related to their claims against Fort Jackson Federal Credit Union.

Also, Plaintiffs have not established the need for reconsideration or to correct clear or manifest error in law or fact, to prevent manifest injustice. Plaintiffs allege that "the

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[1] Plaintiffs state that "[they] suspect the attorney [Charles Brown] fabricated billings and cooperated with defendant to excessively overcharge." Motion at page 11.

'good ole boy' system precludes Black Americans from competent legal representation" and because of this discrimination, he should be awarded attorney's fees for work done on the case as pro se plaintiffs to "act as a deterrent to discrimination."[2] See Motion at page 7. Plaintiffs' allegations is without merit.

Moreover, the Supreme Court has held that pro se litigants are not entitled to recover fees incurred by them for work done as pro se plaintiffs. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Additionally, Plaintiffs argue that, "when the Court fails to award costs and reasonable attorneys fees in this case, it lets Defendants (sic) conduct replace the Right to Financial Privacy Act with the cynic's Golden Rule: 'He who has the gold rules.'" See Motion at page 14. This argument is also meritless.

Section 3417(a) of the Right to Financial Privacy Act, 12 U.S.C. § 3417(a), allows recovery of "reasonable attorney's fees as determined by the court." The Court, after carefully considering the file and the record presented, granted Plaintiffs' an award of $13,500.82 in reasonable attorneys' fees and taxable costs of $3,524.45. Plaintiffs have failed to show manifest error in law or fact to warrant reconsideration or correction of the court's prior ruling.

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[2] Plaintiff also argues that his right to equal protection has been violated. The court is unclear on how this argument relates to the present Motion.

Again, Plaintiffs' displeasure or disagreement with this Court's previous Order is an insufficient basis for reconsideration. *See Leong*, 689 F. Supp. at 1572.

CONCLUSION

Based on the foregoing, the Court finds and concludes that Plaintiffs have failed to meet their burden as set out in *Great Hawaiian Fin. Corp v. Aiu*, 116 F.R.D. 612 (D. Haw. 1987) and L.R. 60.1. Therefore, the Court DENIES Plaintiffs Marshall K. Flowers and Anna Flowers (sic) Motion for Reconsideration of the US Magistrate Judge's Report of the Special Master on Plaintiffs' Motion for Attorney Fees and Non-Taxable Cost.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, APR 14 2004.

/s/_____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed March 19, 2004]

MARSHALL KENNETH FLOWERS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK, Defendants.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiffs, v. DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION, Defendants.

REPORT OF THE SPECIAL MASTER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES AND NON-TABLE (sic) COST

On December 17, 2003, Plaintiffs Marshall K. Flowers and Anna Flowers (collectively, "Plaintiffs") filed a Motion for Attorney Fees and Non-Table (sic) Cost Pursuant to the Final Judgment Order Against First Hawaiian Bank in Civil Case 99-00335 SPK ("Motion"). Also on December 17, 2003, Plaintiff Anna Flowers filed a Substantive Joinder in the Motion. United States District Judge Samuel P. King referred the Motion to this Court pursuant to 28 U.S.C. § 636(b)(l)(B) and Rule 72.4, Local Rules of Practice for the United States District Court for the District of Hawaii ("LR") on December 18, 2003.

Defendant First Hawaiian Bank ("Defendant First Hawaiian") filed a Memorandum in Opposition on January 12, 2004. Plaintiffs filed their Response Memorandum on January 19, 2004. On January 27, 2004, Attorney Arthur E. Ross filed a Memorandum in Support of the Motion and filed a Supplemental Memorandum on February 6, 2004.

The Motion came on for hearing on January 31, 2004. Plaintiff Marshall Kenneth Flowers appeared pro se; Attorney Patsy Kirio appeared for Defendant First Hawaiian; Assistant United States Attorney Theodore Meeker appeared for Defendant United States Department of the Army.

After careful consideration of the Motion and supporting and opposing memoranda, the Court FINDS that Plaintiffs are entitled to reasonable attorneys' fees in the amount of $13,500.82 and costs in the amount of $3,524.45. Accordingly, the Court RECOMMENDS that Plaintiffs'

Motion for Attorney be GRANTED IN PART AND DENIED IN PART.

BACKGROUND

Plaintiffs brought these two suits under the Right to Financial Privacy Act, 12 U.S.C. 01673401 et seq. ("RFPA"). The first suit was filed against the United States Army and Defendant First Hawaiian; the second action was against the United States Army and Defendant Fort Jackson Federal Credit Union. Both actions arose after Defendant First Hawaiian and Fort Jackson Federal Credit Union provided bank or financial records to the United States Army after receiving military subpoenas related to a Article 32 investigation.

Initially, Plaintiffs' suit against Defendant First Hawaiian was dismissed. The Ninth Circuit Court of Appeals reversed that decision and remanded the action to the District Court for further proceedings.

Following remand, Plaintiffs' actions were consolidated.

On December 5, 2003, Judge Samuel P. King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. In pertinent part, the Order entered judgment in favor of Plaintiffs and against Defendant First Hawaiian in the amount of two hundred dollars.

DISCUSSION

Plaintiffs seek recovery of their attorney's fees and costs pursuant to the Right to Financial Privacy Act section 3417(a).

I. Entitlement to Attorneys' Fees

Plaintiffs seek attorneys' fees pursuant to section 3417(a) of the Right Privacy Act which states, in pertinent part,

> Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to who such records relate . . .
> (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Defendant First Hawaiian argues that no fees should be allowed after March 31, 2003, when Defendant First Hawaiian admitted liability for purposes of trial. Defendant First Hawaiian argues any fees incurred after that date are not recoverable under section 3417(a) because Plaintiffs cannot be said to have been successful in enforcing liability.

Defendant First Hawaiian's argument is interesting. However, the argument is not compelling because the plain language of the statute does not specify a cut-off point in determining attorney's fees. The statute allows recovery of attorney's fees and costs in the case of "any successful action to enforce liability." Defendant First Hawaiian was found liable to Plaintiffs for the disclosure of financial information. Judgment was entered pursuant to Judge King's Order in favor of Plaintiffs and against Defendant First Hawaiian for two hundred dollars.

Therefore, the Court determines that under the Right to Financial Privacy Act section 3417(a), Plaintiffs are allowed reasonable attorney's fees and costs of the action.

II. Calculation of Reasonable Attorneys' Fees

In determining reasonable attorneys' fees, the district court must follow the "lodestar" approach adopted by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Supreme court instructs that the most useful starting point to determine a reasonable fee is "the number of hours reasonably expended multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Once calculated, the lodestar is presumptively reasonable. *See Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711,728 (1987): *see also Cunningham v. County of Los Angeles*, 879 F.2d 481 (9th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

In calculating the lodestar amount, the court should also take into account any of the relevant factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adopted by the 9th Circuit in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). These factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions involved:
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client, and;
(12) awards in similar cases.

A reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In determining a reasonable hourly rate, the district court must consider "'the experience, skill, and reputation of the attorney requesting fees.'" *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990)(quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (1985), *amended*, 808 F.2d 1373 (9th Cir. 1987)). The district court should be "guided by the rate prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation, it "is deemed to be reasonable." *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1987). The party "opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and the reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1993)(citing *Blum*, 465 U.S. at 892 n.5).

Plaintiffs request payment of attorney's fees for the following: (1) the work done by them as pro se plaintiffs; (2) fees paid and allegedly owed to Charles Brown, Esq.; and (3) fees paid to Arthur Ross, Esq. The total amount sought by Plaintiffs is not stated in the Motion.

A. Fees as Pro Se Litigants

The Court, initially addresses the fees sought by Plaintiffs for work done on the case as pro se plaintiffs. Pursuant to Judge King's Order and applicable case law, Plaintiffs are not entitled to recover fees incurred for work done by them as prose plaintiffs. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Therefore, the Court does not award any fees requested by Plaintiffs for their work as pro se plaintiffs.

B. Fees of Charles R. Brown

Plaintiffs also seek attorneys fees and costs for the work done by Attorney Charles R. Brown. Plaintiffs attach to the Motion billing statements from Attorney Brown. Again, Plaintiffs fail to state the exact amount sought. The Court, in its discretion, will calculate the total amount of the five billing invoices submitted by Plaintiffs and use that amount as the total fee requested.

Billing Statement Date	Hours x Rate	Amount
March 12, 2003	64.00 x 125.00	$ 8,000.00
April 21, 2003	48.52 x 125.00	$ 6,065.00
June 25, 2003	139.37 x 125.00	$17,421.25
July 18, 2003	74.52 x 125.00	$ 9,315.00
September 23, 2003	79.44 x 125.00	$ 9,930.00
TOTAL	405.85 hours	$50,731.25

Based on the foregoing, the Court deems $50,731.25 as being the total amount of Attorney Brown's fees requested by Plaintiffs.

First, the Court will reduce the hours expended for work done in CV 01-00412 SPK-KSC because Plaintiffs were not successful in establishing or enforcing liability against Fort Jackson Federal Credit Union. Therefore, the Court will initially reduce the requested total number of hours by ninety-five (95) hours.

1. Hourly rates

In determining a reasonable hourly rate, the district court must consider "the experience, skill, and reputation of the attorney requesting fees." *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1384 (9th Cir. 1990) (internal quotations and citations omitted). The Court finds that $125.00 per hour is a reasonable hourly rate charged by Attorney Brown.

2. Hours reasonably expended

Beyond establishing a reasonable hourly rate, a prevailing party seeking attorney's fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained. *See Tirona v. State Farm Mut. Auto Ins. Co.*, 821 F. Supp. 632 (D. Haw. 1993) (citations omitted). The court must also guard against awarding fees and costs which are excessive, and must assess the extent to which fees and costs are self-imposed and could have been avoided. *Id.* at 637 (citing *INVST Financial Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 404 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1988). Moreover, the party seeking the fee "bears the burden

of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 977 F.2d 1300, 1305 (9th Cir. 1992).

First, the Court will delete the hours for the September 23, 2003 billing because there is no summary or adequate description of the billings attached for September 23, 2003. While the summary of billings attached for the other months requested may be incomplete, Plaintiffs submit absolutely no billing summary for the dates set forth in the September 23, 2003 billings. Therefore, the Court will not allow any recovery for amounts sought in the September 23, 2003 invoice and reduce the total hours expended by 79.44 hours.

Second, the Court reduces the hours expended for work done that the Court deems excessive or non-billable items. For example, the description entry for 3/13/03, states that work done was "Re: Meeting w/billing Age"; another example is the entry for 4/24/03 which states "Re: Case Management". These vague entries appear to be clerical or other work which is not recoverable as attorneys' fees for professional services rendered. An example of excessive billing can be found in the 4/19/03 entry, "Re: Subpeona (sic) for Depo.", counsel bills for 1.75 hours. The Court finds 1.75 hours for preparation of deposition subpoenas, without further explanation, is excessive. Based on the foregoing, the following hours are stricken:

Invoice	Hours Reduced
March 13, 2003	15 hours
April 21, 2003	15 hours
June 25, 2003	20 hours
July 18, 2003	15 hours

Therefore, after the reduction of the aforementioned hours, the total hours for invoices March, 2003, April, 2003, June, 2003, July, 2003 are 146.41 hours. Thus, the adjusted lodestar is as follows:

Total Hours requested	405.85	
(minus 95.00)	- 95.00	
Subtotal	310.85	
(minus 79.44)	- 79.44	
Subtotal	231.41	
(minus 65.00)	- 65.00	
		Hourly Rate
Total	166.41 x	$125.00
	= Adjusted Lodestar	
	$20,801.25	

In addition, the Court will reduce the adjusted lodestar amount for failure to detail the work performed. L. R. 54.3 sets forth the contents and requirements for Motion for Attorneys' Fees and related non-taxable expenses. Section (c) of L. R. 54.3, in pertinent part, states "[a] motion for attorneys' fees and related non-taxable expenses shall specify . . . the amount of attorneys' fees and related non-taxable expenses sought." This section goes on to say, "[i]n addition, the moving party shall file a memorandum in support and an affidavit of counsel." Plaintiffs have failed to meet the requirements of Section (c). In addition, Plaintiffs' Motion fails to adequately describe the services provided. Under L.R. 54.3 (d)(2), the court gives examples of information necessary for adequate descriptions of services rendered. The rule states, for example entries for research "must include an identification of the specific issue researched and, if possible, should identify the pleading or document for which the research was necessary." L.R. 54.3(d)(2) goes on further to say, "[i]f the time descriptions are incomplete, or if such

descriptions fail to describe adequately the services rendered, the court may reduce the award accordingly."

Mr. Brown's entries fail to sufficiently detail the services provided. For example, the entry for February 20, 2003 states "re: research". This entry fails to detail the specific issue researched or the document for which the research was conducted. Another example of inadequate description of services provided is the 4/24/03 entry, "Re: Pleadings Review". The entry fails to specify which pleadings were being reviewed and for what purpose. Therefore, the Court, in accordance with L.R. 54(d)(3)(2), reduces the adjusted lodestar by twenty percent (20%).

In addition, the Court reduces the adjusted lodestar by twenty-five percent (25%) for work conducted on claims that Plaintiffs were unsuccessful, i.e. punitive damages and tortious interference with prospective economic advantage.

This Court finds the following lodestar to be reasonable for Attorney Brown's fees:

	HOURS	RATE	LODESTAR
	166.41	$125.00	$20,801.25
(minus 20%)			- 4,160.25
Subtotal			$16,641.00
(minus 25%)			- 4,160.25
Subtotal			$12,480.75
(4.167% tax)			+ 520.07
Attorney Brown's Total Lodestar			$13,000.82

C. Fees of Arthur E. Ross

Second, Attorney Arthur E. Ross seeks the recovery of fees incurred in defending Defendant First Hawaiian's motion to dismiss complaint. On January 27, 2004, Attorney Arthur E. Ross submitted a Memorandum in Support of Attorney Fees Incurred and Billed to Marshall Flowers in Defending Claim against Fort Jackson Federal Credit Union in November 1999. On February 6, 2004, Mr. Ross filed a Supplemental Memorandum in Support of Attorneys Fees Incurred in Defending Claim of Marshall K. Flowers Against First Hawaii Bank October 1999. Mr. Ross' declarations state that he retained Attorney Rory Toomey to assist him in preparing an opposition to Defendant First Hawaiian's motion to dismiss complaint and Defendant Fort Jackson's motion to dismiss. Mr. Ross' declaration stated that he agreed to pay Mr. Toomey the hourly rate of one hundred dollars. Mr. Toomey's declaration states that he spent twenty-three hours working on the opposition to Defendant Fort Jackson's motion to dismiss and five hours on the opposition to Defendant First Hawaiian's motion to dismiss.

The Court finds that one hundred dollars is a reasonable hourly rate for Mr. Toomey. The Court further finds that five (5) hours is reasonable amount of time expended for researching and drafting an opposition to a motion to dismiss. Thus, five hundred dollars is a reasonable lodestar. The Court disallows any amounts sought for work with regards to Defendant Fort Jackson because Plaintiffs are not the prevailing party with regards to Defendant Fort Jackson.

Therefore, based on the foregoing, this Court finds that Plaintiffs have established the appropriateness of an award of attorneys' fees as follows:

Attorney Brown	$13,000.82
Attorney Toomey	$ 500.00
TOTAL LODESTAR	$13,500.82

III.BILL OF COSTS

Plaintiffs' Motion also requests costs incurred in this action.

Fed. R. Civ. P. 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); *Trans Container Services (Basel) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). These costs are submitted to and taxed by the Clerk of the Court. *Id.* Any objections by the losing party must be "on motion served within 5 days thereafter." *Id.*

The Supreme Court has held that "28 U.S.C. § 1920 embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 482 (1987). Therefore, Petitioners are entitled to an award of those costs that are included within the definitions provided by 28 U.S.C. § 1920.

While courts do not have discretion to tax costs not included within the definitions provided by § 1920, courts do have discretion to interpret the meaning of phrases used in § 1920 in determining whether a requested cost falls within those definitions. *See Alflex Corp. v. Underwriters Labs, Inc.*, 914 F.2d 175, 177 (9th Cir. 1990). Costs defined in § 1920 include the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of the title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. §1920.

Courts also have the discretion to deny costs. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997). There is a strong presumption in favor of costs to the prevailing party, the unsuccessful litigant must point to some "impropriety on the part of the prevailing party that would justify denial of costs." *National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471-1472 (9th Cir. 1995). A court must specify reasons for its refusal to award costs. *See Assoc. of Mexican-American Educators v. Cal.*, 231 F.3d 572, 591 (9th Cir. 2000) citing *Subscription Televisions, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 P.2d 230, 234 (9th Cir. 1978).

For the purposes of awarding costs under Fed. R. Civ. P. 54(d), the prevailing party is generally one in whose favor judgment is rendered by the court. *See Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997) (quoting *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977)). However, should each party be awarded partial judgment, the court has discretion to require each party to bear its own costs. *See id.*

(citing *Testa v. Village of Mundelein*, 89 F.3d 443 (7th Cir. 1996)).

On December 5, 2003, Judge Samuel P. King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. Judgment was entered in favor of Plaintiffs and against Defendant First Hawaiian in the amount of two hundred dollars.

In Plaintiffs' Motion, Plaintiffs seek as costs all the items listed in Exhibit D. Also, on January 29, 2004, Plaintiffs filed a Bill of Costs, Form AO 133, requesting a total of $4,594.04 in costs. Under L.R. 54.2, any request for costs are to be made "within thirty (30) days of the entry of judgment" and "noncompliance with this time limit shall be deemed a waiver of costs." Defendant First Hawaiian argues that the Form AO 133 filed January 29, 2004 is untimely and thus Plaintiffs have waived any recovery of cost. However, since Plaintiffs did request costs in their Motion for Attorneys' fees, the Court will treat the Form AO 133, Bill of Costs as an amended request for costs.

The Court finds that the costs requested in Exhibit D of the Motion are not recoverable under 28 U.S.C. § 1920. Therefore, Plaintiffs are not entitled to any costs sought in Exhibit D. As to the amounts requests in AO Form 133, Plaintiffs seek the following:

Fees of the Clerk	$ 150.00
Fees of the court reporter	$2,002.61
Photocopies	$2,313.10
Video Tape Duplication	$ 128.83
	$4,594.54[1]

The Court denies $20.00 for tape transcript and tape because Plaintiffs have failed to attach an invoice for this amount sought.

A. Fees of the Court Reporter

Plaintiffs seek $2,002.61 in court reporter fees.

Fees incurred obtaining deposition transcripts may be recovered under 28 U.S.C. §1920(2). *See Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.* 976 F.2d 541, 551 (9th Cir. 1992). Such costs are recoverable only if necessarily obtained for use in the case. Denial of cost for deposition transcripts, solely because they were not used at trial, is within the district court's discretion. *See Washington State Dept. of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 806 (9th Cir. 1995). Conversely, the court may grant the cost of deposition transcripts not used at trial or in conjunction with summary judgment provided the transcripts were "necessarily obtained." *See Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1439 (9th Cir. 1993)(internal quotation omitted).

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[1] This total represents the correct amount of the costs requested. Plaintiffs' total of $4,594.04 was a miscalculation.

The Court denies video conference charges of $351.56 and $351.56, included in the requested fees of the court reporter, because these charges are not recoverable under 28 U.S.C. § 1920.

The Court will allow $1,299.49 in fees of the court reporter.

B. Photocopies

Plaintiffs request photocopying costs in the amount of $2,313.10.

28 U.S.C. § 1920(4) permits taxation for the copies of papers "necessarily obtained for use in the case" and does not require that the copied document be introduced into the record. *Haagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990). The practice of this Court is to award $0.15 per page for copies necessarily obtained for use in the case.

The Court finds that some of the photocopying costs were probably used in the litigation with Defendant Fort Jackson, therefore, the Court reduces the amount requested for photocopying by fifteen (15%) percent. Thus, Plaintiffs may recover $1,966.13 in photocopy charges.

Based on the foregoing, Court allows taxation of costs in the following amounts:

Fees of the Clerk	$ 150.00
Fees of the court reporter	$1,299.49
Photocopies	$1,966.13
Video Tape Duplication	~~$ 108.83~~

TOTAL COSTS AWARDED $3,524.45

CONCLUSION

Based on the foregoing, the Court RECOMMENDS that the Motion be GRANTED IN PART AND DENIED IN PART and that Plaintiffs be awarded attorneys' fees in the amount of $13,500.82 and that the Clerk of the Court tax costs in the amount of $3,524.45.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, MAR 19 2004

/s/ _____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed March 1, 2004]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

ORDER ADOPTING FINDINGS AND RECOMMENDATION REGARDING DEFENDANT FORT JACKSON FEDERAL CREDIT UNION'S BILL OF COSTS

The Court has reviewed the February 9, 2004, Findings and Recommendation ("F&R") of United States Magistrate Judge Kevin Chang to deny Plaintiffs' objections to Defendant Fort Jackson Federal Credit Union's ("Fort Jackson FCU") Bill of Costs, and to tax costs of $4,901.23 against Plaintiffs and for Fort Jackson FCU. The Court has also reviewed Plaintiffs' February 13, 2004, Motion for Review of Judge Chang's F&R and Fort Jackson FCU's Memorandum in Opposition.

After such review, the Court now ADOPTS the Findings and Recommendation to tax costs of $4,901.23 against Plaintiffs and for Fort Jackson FCU. The Court agrees with Judge Chang that Fort Jackson FCU was a prevailing party as to Plaintiffs' claims against Fort Jackson FCU. The Court also agrees that, under 28 U.S.C. § 1920, the requested costs were "actually and necessarily incurred" to defend the action.

The February 9, 2004 Report of the Special Master on Defendant Fort Jackson Federal Credit Union's Bill of Costs is ADOPTED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, 1 March, 2004.

/s/ _____

SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed February 9, 2004]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK, Defendants.

MARSHALL KENNETH FLOWERS Plaintiffs,

v.

DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L) and FORT JACKSON FEDERAL CREDIT UNION, Defendants.

REPORT OF THE SPECIAL MASTER ON DEFENDANT FORT JACKSON FEDERAL CREDIT UNION'S BILL OF COSTS

On January 7, 2004 Defendant Fort Jackson Federal Credit Union ("Defendant Fort Jackson") filed its Bill of Costs. An Amended Bill of Costs was filed on January 8, 2004.[1] Plaintiffs Marshall K. Flowers and Anna Flowers (collectively, "Plaintiffs") filed their opposition to the Bill of Costs on January 14, 2004. United States District Judge Samuel P. King referred the Bill of Costs to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule ("LR") 72.4 on December 18, 2003. This Court finds this matter suitable without a hearing, pursuant to Local Rules of Practice for the United States District Court for the District of Hawaii ("LR") 7.2(d).

BACKGROUND

Plaintiffs brought these two suits under the Right to Financial Privacy Act, 12 U.S.C. 01673401 et seq. ("RFPA"). The first filed case was against the United States Army and First Hawaiian Bank; the second action was against the United States Army and Fort Jackson Federal Credit Union. Both actions arose after First Hawaiian Bank and Defendant Fort Jackson provided bank or financial records to the United States Army after receiving military subpoenas related to an Article 32 investigation.

Initially, the suit against Defendant First Hawaiian was dismissed. The Ninth Circuit Court of Appeals reversed the

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[1] The Amended Bill of Costs did not change any amounts, but merely used the Court's form Bill of Costs.

decision and remanded the action to the District Court for further proceedings.

After the remand, both actions were consolidated.

On December 5, 2003, Judge King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. In pertinent part, this Order entered Judgment in favor of Defendant Fort Jackson and against Plaintiffs. A judgment was entered on December 8, 2003.

Thereafter, Defendant Fort Jackson filed its Bill of Costs.

DISCUSSION

In pertinent part, Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); *Trans Container Services (Basel) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). These costs are submitted to and taxed by the Clerk of the Court. *Id.* Any objections by the losing party must be "on motion served within 5 days thereafter." *Id.*

The Supreme Court has held that "28 U.S.C. § 1920 embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 482 (1987). Therefore, petitioners are entitled to an award of those costs that are included within the definitions provided by 28 U.S.C. § 1920.

While courts do not have discretion to tax costs not included within the definitions provided by § 1920, courts do

have discretion to interpret the meaning of phrases used in § 1920 in determining whether a requested items of costs falls within those definitions. *See Alflex Corp, v. Underwriters Labs, Inc.*, 914 F.2d 175, 177 (9th Cir. 1990). Costs defined in § 1920 include the following:

1. Fees of the clerk and marshal;
2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and copies of papers necessarily obtained for use in the case;
5. Docket fees under section 1923 of the title;
6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Courts also have the discretion to deny costs. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997). There is a strong presumption in favor of costs to the prevailing party and the unsuccessful litigant must point to some "impropriety on the part of the prevailing party that would justify denial of costs."

National Info. Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1471-1472 (9th Cir. 1995). A court must specify reasons for its refusal to award costs. *See Assoc. of Mexican-American Educators v. Cal.*, 231 F.3d 572, 591 (9th Cir. 2000) citing *Subscription Televisions, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 P.2d 230, 234 (9th Cir. 1978).

Defendant Fort Jackson seeks the following in costs:

Fees of the court reporter	$3,076.31
Photocopies	$1,770.23
Video Tape Duplication	$ 54.69
	$4,901.23

Plaintiffs object to Defendant Fort Jackson's Bill of Costs as being untimely. Plaintiffs' objection is without merit.

The Court finds that Defendant Fort Jackson's Bill of Costs has been timely filed. Rule 54.2(b) of the Local Rules of Practice for the District of Hawaii, allows for the filing of a Bill of Cost within 30 days from the entry of judgment, unless otherwise ordered by the Court. Judgment was entered on December 8, 2003. Defendant Fort Jackson's Bill of Cost was timely filed on January 7, 2004.

Plaintiffs further argue in objection to the Bill of Costs that Defendant Fort Jackson is not a prevailing party. This objection is also without merit. It is clear that Defendant Fort Jackson is the prevailing party. For the purposes of awarding costs under Rule 54(d), the prevailing party is generally one in whose favor judgment is rendered by the court. *See Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997) (quoting *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977)). Judge King's order specifically directs that Judgment should be entered against Plaintiffs in favor of Defendant Fort Jackson. Judgment was entered as such. Thus, Defendant Fort Jackson is the prevailing party in this action and is entitled to costs under Rule 54(d).

Plaintiffs, more specifically, objects to costs associated with the depositions of Plaintiffs, Velma Jones, Kenneth Credicos, Major John N. Ohlweiler and Major Randall

Bagwell. Defendant Fort Jackson seeks court reporter fees of $3,076.31 for deposition transcripts.

Fees incurred in obtaining deposition transcripts may be recoverable under 28 U.S.C. § 1920(2). *See Association of Flight Attendants v. Horizon Air Indus. Inc.*, 976 F.2d 541, 551 (9th Cir. 1992). Deposition costs are recoverable only if necessarily obtained for use in the case. *See Alflex*, 914 F.2d at 177-78. In this case, Defendant Fort Jackson used the above-referenced deposition transcripts in support of its Motions for Summary Judgment. The deposition transcripts were reasonably and necessarily obtained for use in this case. Accordingly, the court finds that the court reporter fees requested by Defendant Fort Jackson are permissible under 28 U.S.C. § 1920(2).

Defendant Fort Jackson seeks photocopy charges of $1,770.23.

28 U.S.C. § 1920(4) permits taxation for the copies of papers "necessarily obtained for use in the case" and does not require that the copied document be introduced into the record. *Haagen-Dazs Company, Inc. v. Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990). The practice of this court is to award $.15 per page for copies made in-house[2] that were necessarily obtained for use in the case. This court generally awards copying costs as charged by commercial copiers and/or courts. Thus, the Court allows the costs sought for photocopying in the amount of $1,770.23.

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[2] Defendant Fort Jackson seeks in-house copying charges of $.10.

Having carefully reviewed Defendant Fort Jackson's Bill of Costs, Amended Bill of Costs, the attached exhibits, and counsel's affidavit verifying that the costs were actually and necessarily incurred in the action, the Court finds that Defendant Fort Jackson is entitled to recover all of its costs claimed.

CONCLUSION

Based on the foregoing, the Court RECOMMENDS that Plaintiffs' objections to the Bill of Costs be DENIED and that costs be taxed against Plaintiffs Marshall Kenneth Flowers and Anna Flowers and for Defendant Fort Jackson in the amount of $4,901.23.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, FEB 09 2004

/s/ _____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed January 26, 2004]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

ORDER DISMISSING CROSS-CLAIMS AND GRANTING MOTION TO EXTEND DEADLINE TO FILE NOTICE OF APPEAL

Plaintiffs have filed a Motion to Extend Deadline to File a Notice of Appeal Pursuant to Rule 58 of the Federal Rules of Civil Procedure. Under Local Rule 7.2(d), the Court finds the matter suitable for decision without an oral hearing. For the reasons set forth, the Court DISMISSES any remaining cross-claims and GRANTS Plaintiffs' motion to extend the time for appeal.

DISCUSSION

Final Judgment in these consolidated cases was entered on December 8, 2003.[1] Because the United States is a party, the time to appeal -- absent a properly-filed tolling motion under Fed. R. App. P. 4(a)(4) -- expires 60 days from entry of judgment. *See* Fed. R. App. P. 4(a)(1)(B). Plaintiffs filed a

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[1] To the extent the pendency of cross-claims for contribution or indemnity would affect the finality of judgment, the Court DISMISSES the cross-claims. The cross-claim by Defendant Fort Jackson Federal Credit Union against the United States of America is DISMISSED without prejudice as MOOT because the Court has earlier dismissed Plaintiffs' claims against Fort Jackson FCU; if Fort Jackson FCU is not liable, then it need not seek contribution or indemnity.

Likewise, the cross-claim by Defendant First Hawaiian Bank against the United States is DISMISSED because, as set forth in the Court's earlier order, the United States is protected from liability for damages under the *Feres* doctrine. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding that third-party indemnity against the government is limited by the rationale of *Feres* where the injured party is a service person).

Fed. R. Civ. P. 60 motion for reconsideration (a tolling motion under Fed. R. App. P. 4(a)(4)(vi)) on December 15, 2003, which this Court denied on January 5, 2004. Without more, the time for appeal would presumably expire 60 days thereafter (on or about March 5, 2004).

Meanwhile, Plaintiffs filed a Motion for Attorneys Fees and Non-taxable Costs on December 22, 2003. Those proceedings are ongoing and could conceivably extend beyond March 5, 2004 (a hearing is presently set for January 30, 2004 before Judge Chang sitting as a special master). Ordinarily, attorneys fees matters are collateral to the merits of a case and any appeal to a circuit court from a final decision on attorneys fees would require a separate notice of appeal. *See* Fed. R. Civ. P. 58(c)(1); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

However, Fed. R. App. P. 4(a)(4) provides in pertinent part:

> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . . .
>
> (iii) for attorney's fees under Rule 54 <u>if the district court extends the time to appeal under Rule 58</u> (emphasis added).

In turn, Fed. R. Civ. P. 58 provides in pertinent part:

> (c) Cost or Fee Awards.

> (1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).
>
> (2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

By the instant motion, Plaintiffs apparently seek under Fed. R. App. P. 4(a)(4)(iii) and Fed. R. Civ. P. 58 to treat the motion for attorneys fees as a tolling motion for purposes of appeals from final judgment and rulings on attorneys fees. Commentary to the 1993 amendments to Rule 58 indicates that

> in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. [Fed. R. App. P. 4(a)(4)(iii)] permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

Given the lengthy proceedings in these cases, the Court concludes that it would be more efficient to resolve questions of attorneys fees before an appeal is taken so that any appeal

relating to any fee award (or lack thereof) can be heard at the same time as any appeals regarding the merits of these consolidated cases.

CONCLUSION

Therefore, under Fed. R. Civ. P. 58(c)(2), Plaintiffs' motion for attorneys fees is to be treated in the same manner as a timely motion under Fed. R. Civ. P. 59. Plaintiffs seek an extension of 30 days in the time to appeal. Accordingly, the time for appeal shall be 30 days from the final district court decision on the Plaintiffs' motion for attorneys fees.

So as not to affect the finality of judgment, the Court also DISMISSES any remaining cross-claims between Defendants.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, January 26, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed January 5, 2004]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

ORDER AMENDING ORDER OF DECEMBER 5, 2003 AND DENYING MOTION FOR RECONSIDERATION

The Court's Order of December 5, 2003 is amended as follows: On page 13, line 1, replace "will" with "with" so the sentence reads "Flowers presumably then retired with full military benefits."

The Court has reviewed Plaintiffs' Motion for Reconsideration of the December 5, 2003, Order and the oppositions of the Defendants. A motion for reconsideration must demonstrate either (a) discovery of new material facts not previously available; (b) intervening change in law; or (c) manifest error of law or fact. LR 60.1. Applied here, the new evidence cited was not material and does not change the Court's conclusions. There has been no intervening change in law nor any manifest error of law or fact. The motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, January 5, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC

[Filed December 8, 2003]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiff(s),	)
v.	)
FIRST HAWAIIAN BANK, Defendant(s).	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the, "Order Granting in Part And Denying In Part Motions For Summary Judgment And Ruling On Other Pending Matters", by the Honorable Senior U.S. District Judge Samuel P. King, filed December 5, 2003, Judgment is entered in favor of

Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

December 8, 2003 — Date

WALTER A.Y.H. CHINN — Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 01-412SPK/BMK

[Filed December 8, 2003]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiff(s),	)
v.	)
UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION, Defendant(s).	)

Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the, "Order Granting in Part And Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters", by the Honorable Senior U.S. District Judge Samuel P. King,

filed December 5, 2003, Judgment is entered against Plaintiffs and in favor of Defendant Fort Jackson FCU.

December 8, 2003 WALTER A.Y.H. CHINN
Date Clerk

/s/
(By) Deputy Clerk

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed December 5, 2003]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

JUDGES: SAMUEL P. KING, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND RULING ON OTHER PENDING MATTERS

OVERVIEW

In the latest set of motions in this case, the "Bank Defendants" (First Hawaiian Bank and Fort Jackson Federal Credit Union) have filed several motions for summary judgment on various aspects of the remaining claims. Plaintiffs Marshall and Anna Flowers have also filed a motion for summary judgment on liability under their claim under the Right to Financial Privacy Act, 12 U.S.C. § 3401, et seq. They have also filed a motion under Fed. R. Civ. P. 56(f) to postpone summary judgment proceedings for further discovery, which the Court will consider as part of the Plaintiffs' opposition to the various motions.

The motions at issue are: (1) Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims; (2) Fort Jackson FCU's Motion for Partial Summary Judgment Re. Punitive Damages (substantive joinder by First Hawaiian Bank); (3) Fort Jackson FCU's Motion for Partial Summary Judgment Re. Tortious Interference with Prospective Economic Advantage (substantive joinder by First Hawaiian Bank); (4) First Hawaiian Bank's Motion for Partial Summary Judgment On Claims for Attorneys' Fees; (5) First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages (substantive joinder by Fort Jackson FCU); and (6) Plaintiffs' Motion for Partial Summary Judgment.

For the reasons to follow, the Court GRANTS motions 1, 2, 3 and 5. The Court GRANTS in part and DENIES in part motions 4 and 6. The Court DENIES Plaintiffs' request for a continuance under Rule 56(f) because the issues involved are primarily questions of law on undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion. Therefore, there being no triable issues of fact, judgment shall enter against Plaintiffs and in favor of Defendant Fort Jackson FCU. Judgment shall enter in favor of Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

BACKGROUND

The basic factual and procedural background of this case is set forth in this Court's order at *Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993 (D. Haw. 2000), in the Ninth Circuit's opinion at *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), and in this Court's recent decision in *Flowers v. First Hawaiian Bank*, 289 F. Supp. 2d 1213, 2003 U.S. Dist. LEXIS 20101, 2003 WL 22533140 (D. Haw. Oct 31, 2003). Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving military subpoenas during Article 32 investigatory proceedings against then-Sergeant-Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded to this Court after determining that an Article 32 subpoena was invalid and that litigation and grand jury exemptions under 12 U.S.C. §§ 3413(e) and 3413(i) did not apply. *See Flowers*, 295 F.3d at 970-77.

After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson FCU (Civ. No. 01-412). Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson FCU's motion to consolidate. Subsequently, in recent orders, this Court dismissed constitutional claims and claims by Anna Flowers against Fort Jackson FCU. This Court also dismissed claims for damages against the United States based upon *Feres v. United States*, 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1950) and its progeny. *See Flowers*, 289 F. Supp. 2d at 1217, 2003 U.S. Dist. LEXIS 20101, 2003 WL 22533140, at *8. The instant order addresses remaining claims.

The Army's underlying Article 32 proceedings are collateral to the RFPA claims at issue in the case. The Court's role here is not to resolve or even to address the validity of the past larceny charges against Marshall Flowers. It has become apparent, however, that those charges and proceedings, although collateral, are nevertheless relevant to the primary remaining issues (causation and damages) in this suit. Plaintiffs and Defendants have provided much of the evidence or procedural history of those military proceedings as part of this RFPA case. Marshall Flowers spends much effort discussing those allegations and attempting to refute some of the evidence. He contends that the Bank Defendants' financial disclosures -- not the underlying military proceedings -- caused him damages, to wit, his leaving the Army two years short of his goal of 30 years of service. The Court therefore sets forth some of the relevant background of the charges and the underlying procedural history as necessary to explain why the financial disclosures, even if either Bank Defendant violated the terms of the RFPA, nevertheless are not responsible for Plaintiffs' alleged damages.

The evidence in the record provides, among other things, as follows:[1]

In December of 1997, SGM Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video. [*See* Plank Decl.; Hollis Decl; Exhibits C, F, and L to Concise Statement of Facts in Support of Defendant First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages ("Motion 5 CSF")].

Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. [Motion 5 CSF, Exh. F, G]. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. [*Id.* Exh. K]. The evidence obtained by the CID appears to be substantial, although there apparently is or was some question about some of its admissibility in a subsequent criminal trial. [*Id.* at 16]. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer. [*Id.*, Exhs. K & O].

In April of 1998, the Army filed 42 charges of larceny against Flowers. [*Id.* Exh. M]. An Article 32 investigation

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[1] Although Plaintiffs attempt to dispute some of the details, the evidence is uncontradicted in any pertinent part. Any disputes of fact are not material to the issues now before the court.

was begun but proceedings were postponed at the request of defense counsel until June of 1998. [*Id.* Exh. N].

On June 19, 1998, a DD Form 453 subpoena was issued by the United States Army to First Hawaiian Bank requesting "all bank records, # 25478010, to include all deposits and withdrawals." This account belonged to Marshall and Anna Flowers. It stated that it was issued for an "Article 32 hearing" and cites Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." [*Id.* Exh. S].

First Hawaiian Bank notified Marshall Flowers of the subpoena by letter dated July 1, 1998, although it did not do so pursuant to the RFPA nor did it otherwise comply with the RFPA. [Moriki Decl.; Nakasone Decl; Motion 5 CSF, Exhibits F and JJ]. The notification appears to have been done as a matter of courtesy. First Hawaiian Bank did not actually produce documents to the Army until August 12, 1998. [Nakasone Decl.; Motion 5 CSF, Exhibits G and H].

On June 24, 1998, a DD Form 453 subpoena was issued by the United States Army to Fort Jackson FCU in South Carolina requesting "all bank account information since 1 Jan 97, to include # 582593." It also cited Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." [Exh. B to Concise Statement of Facts in Support of Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims ("Motion 1 CSF")]. The subpoena differed on its face from the subpoena issued to First Hawaiian Bank because it stated that the documents were for "a General court-martial of the United States ... appointed by MG James T. Hill to provide

evidence in the matter of United States v. SGM Marshall Flowers." [*Id.*] In contrast, the subpoena issued to First Hawaiian Bank was stated to be for "an Article 32 hearing," which is preliminary to a court-martial proceeding. [*Id.* Exh. C].

There appears to be no dispute that when the Fort Jackson FCU subpoena was issued there was not as yet any actual General Court-Martial proceeding ongoing (except perhaps to the extent an Article 32 could be considered as a necessary prerequisite to -- and therefore part of -- a court-martial). Perhaps the Army only intended to use the documents if the proceedings reached the court-martial stage, or perhaps the subpoena was wrong. The deposition testimony of Major Ohlweiler, the officer who signed both subpoenas, indicates the Fort Jackson FCU subpoena contained erroneous language. [*Id.* Exh. D ("The paralegal typed it out and I signed it, and he or she, and I don't remember who it was, wrote General Court-Martial rather than Article 32")]. In any event, there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial. A cover letter from Ohlweiler to Fort Jackson FCU accompanying the subpoena stated that "SGM Flowers is currently facing a Court-Martial for 42 specifications of larceny." [Supplemental CSF in Support of Fort Jackson FCU's Reply Memorandum re: Punitive Damages and RFPA Claims, Exh. B]. Fort Jackson FCU complied with the subpoena by mailing credit union account statements to the Army on July 2, 1998. [*Id.* Exh. A].

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer issued a report reviewing the evidence and recommended that the charges against SGM Flowers be

adjudicated in a trial by General Court-Martial. [Motion 5 CSF, Exh. O]. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding. [*See, e.g., id.*, Exh. D (deposition testimony of General James Hill); Exh. F at 72-74, 92-93 (deposition testimony of Major Ohlweiler)].

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittins. Mr. Gittens specializes in military defense cases and is known for handling "high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru. [*Id.*, Exh. F, at 81-82].

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and ... wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement." [*Id.*, at 82]. Gittins prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. [*Id.*, Exh. B]. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998. [*Id.*]

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittins, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." [*Id.* Exh. P] Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely believe demanding a trial by court-martial is irresponsible and totally unsound ... I urge you to reconsider and accept the article 15 offered to you in this case." [*Id.*] Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittins, on August 22, 1998 and by the Army on August 28, 1998. [*Id.* Exh. Y].

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. [Exh. C at 184, F at 98-100]. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. [Exh. W]. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented in the Article 15 proceeding. [Exh. F at 98-100].

Flowers appealed the Article 15 punishment. [Exh. Y]. (As part of the appeal, Flowers treats the financial

information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case.") [Exh. Y, at 3]. The appeal was denied by General Hill. [Exh. D at 51, 60].

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement. According to an affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. [Affidavit of Marshall K. Flowers "in Opposition to Defendant First Hawaiian Bank [sic] Motion for Summary [sic] Re. All Claims," at 5-6]. A second Article 32 hearing was eventually held on March 18 and 19, 1999. The result of the second hearing appears to have been favorable to Flowers. [*Id.* at 6]. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had apparently decided to proceed with a General Court-Martial anyway. [Motion 5 CSF, Exh. D at 68].

At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. [Motion 5 CSF, at Exh. D, Exh. Z]. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." [*Id.* Exh. Z]. General Hill approved the bar and testified that such a bar should have been imposed long before

as a matter of course once charges were preferred. [*Id.* Exh. D at 73].

On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. [*Id.* Exh. AA]. The appeal was denied on June 21, 1999. [*Id.* Exh. BB]. General Hill then directed that Flowers had 14 days to submit his retirement. [*Id.* Exh. CC]. Flowers presumably then retired will full military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

ANALYSIS

1. Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims.

Fort Jackson FCU moves for partial summary judgment on claims brought under the RFPA, contending that the subpoena issued to Fort Jackson FCU falls within a "litigation exception" to the RFPA under 12 U.S.C. § 3413(e). Section 3413(e) provides:

> Disclosure pursuant to Federal Rules of Criminal Procedure of comparable rules of other courts.
>
> Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

This exception was litigated in the prior proceedings. The Court applied it to bar the RFPA claim against First Hawaiian

Bank but the Ninth Circuit held that an Article 32 subpoena, although it fulfilled all other elements of the exception, was not issued "under ... comparable rules of other courts" because the UCMJ does not authorize subpoenas in Article 32 proceedings to civilian parties. *Flowers*, 295 F.3d at 972-73. To protect itself, the Ninth Circuit reasoned, First Hawaiian Bank could have obtained a certificate of compliance from the Army pursuant to the RFPA. *Id.* at 975.

Fort Jackson FCU, however, points out that the subpoena issued to it by the Army -- unlike the subpoena issued to First Hawaiian Bank -- was a General Court Martial subpoena. Indeed, the Ninth Circuit indicated that this might make a difference because the UCMJ does specifically authorize subpoenas in court-martials. *See id.* at 972 ("Our conclusion might be otherwise if the subpoena were issued in connection with a pending court-martial proceeding ... The UCMJ, however, specifically authorizes the issuance of a subpoena in court-martial proceedings. No such authority exists for the issuance of a supoena in an Article 32 proceeding.").

Fort Jackson FCU argues that this distinguishes the Ninth Circuit *Flowers* opinion. Even after *Flowers*, a General Court-Martial subpoena still falls within the "litigation exception" to the RFPA. The only complication is that apparently this was NOT yet a General Court-Martial; the Fort Jackson FCU subpoena appears to have been wrong. Facially, however, the subpoena was one that fits within an exception. There was no way Fort Jackson FCU would have, or even should have, known that the underlying proceeding had not yet reached courtmartial stage. As stated earlier, the Army in the subpoena's cover letter reiterated that the information was needed for a General Court Martial. Even if the Army incorrectly listed the subpoena, perhaps prematurely, as being for a General Court Martial, this is not

Fort Jackson FCU's fault. *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 376 (5th Cir. 2000) (applying section 3413(e) and finding bank not liable under the RFPA for disclosures made during a General Court Martial even if the Army violated its own regulations).

Despite the Plaintiffs' arguments to the contrary, there is absolutely no evidence that the Fort Jackson FCU subpoena was "manufactured" or otherwise fraudulently created after the Ninth Circuit's opinion in *Flowers* so as to fit within the language of the opinion. All the evidence indicates that the subpoena in the record is the subpoena issued on June 24, 1998 that led to the financial disclosures at issue in this action. Because the subpoena facially met the requirements under section 3413(e) and because there is absolutely no indication that Fort Jackson FCU had reason to know that the subpoena might have been improper, the Court GRANTS Fort Jackson FCU's motion for partial summary judgment. The subpoena fits squarely within the "litigation exception" to the RFPA under 12 U.S.C. § 3413(e).

2. Fort Jackson FCU's Motion for Partial Summary Judgment Re. Punitive Damages (Substantive Joinder by First Hawaiian Bank).

Both Bank Defendants ask the Court to dismiss the punitive damage claims under 12 U.S.C. § 3417(a)(3) because there is no evidence of "willfulness." The Court agrees.

Section 3417(a) provides:

(a) Liability of agencies or departments of United States or financial institutions

> Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of–
>
> (1) $100 without regard to the volume of records involved;
>
> (2) any actual damages sustained by the customer as a result of the disclosure;
>
> (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional [emphasis added]; and
>
> (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

"Willfulness" for purposes of punitive damages under the RFPA requires actions that are "more than gross negligence" and "so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful." *Taylor v. Dep't of the Air Force*, 18 F. Supp. 2d 1184, 1192 (D. Colo. 1998) (citing *Andrews v. Veterans Admin.*, 838 F.2d 418, 425 (10th Cir. 1988)).

On the present record, there is no evidence coming close to this standard. Every indication was, prior to the Ninth Circuit's opinion, that it was proper for financial institutions to comply with military subpoenas without fear of violating the RFPA. *See, e.g., Russell v. Department of the Air Force*, 915 F. Supp. 1108 (D. Colo. 1996) (addressing use under

RFPA of financial records obtained during Article 32 proceedings and appearing to treat such subpoenas as proper). Even this Court agreed with the interpretation that an Article 32 subpoena fell within the exception. Although the Ninth Circuit has clarified the law in this area, the Bank Defendants cannot be held to have "willfully" violated the RFPA by relying on facially valid military subpoenas. Indeed, First Hawaiian Bank did not release any information until after it sent notification to the Plaintiffs by letter. With either the "Article 32 subpoena" or the General Court Martial Subpoena at issue here, there was no indication that the subpoenas were improper.

Moreover, if the section 3413(e) exception applied, there was no reason to obtain a certificate of compliance under 12 U.S.C. § 3411 because "nothing in [the RFPA] shall apply where records are sought" in litigation between the Government and the customer under section 3413(e). That is, the certificate of compliance sections of the RFPA did not apply. The Bank Defendants were faced with subpoenas directing that failure to comply is a crime against the United States and is punishable by a fine of not more than $500 or imprisonment for six months. Good faith compliance with the subpoenas by the Bank Defendants was certainly prudent and not reason to impose punitive damages.

The only question is whether to allow the Plaintiffs more time for discovery under Rule 56(f) to seek evidence of willfulness. But there has been no showing of any possibility of such evidence. The relevant discovery has occurred. Plaintiffs have obtained depositions or documents, or had an opportunity to discover such evidence, from all the First Hawaiian Bank and Fort Jackson FCU employees who had contact or responsibility with compliance with the particular subpoenas at issue. Further discovery in this regard from the

Army witnesses would not be relevant to the state of mind of the Bank Defendants. At best, Plaintiffs have some hope that evidence of egregiousness will develop and this is not enough. *See Continental Maritime of San Francisco, Inc. v. Pac. Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1395 (9th Cir. 1987) ("The mere hope that further evidence may develop ... is an insufficient basis for a continuance under Fed. R. Civ. P. 56(f)"); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991) (reasoning that the party opposing summary judgment bears burden of showing that evidence sought actually exists and that a denial of a Rule 56(f) application is proper where the evidence sought is almost certainly nonexistent and the object of pure speculation). The Rule 56(f) request is DENIED.

3. Fort Jackson FCU's Motion for Partial Summary Judgment Re. Tortious Interference with Prospective Economic Advantage (Substantive Joinder by First Hawaiian Bank).

The Bank Defendants ask the Court to dismiss the TIPEA claim. According to the operative complaint's allegations, this claim was directed only at the federal defendants (who were dismissed a few weeks ago under *Feres*). This is true, and the cause of action fails on this basis alone. Even if not, this tort claim appears to be barred by the RFPA's exclusivity of remedies provision. *See* 12 U.S.C. § 3417(d) ("The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter").[2]

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[2] This provision also bars any remaining state tort claim for intentional or negligent infliction of emotional distress.

In any event, the TIPEA claim fails. The theory would be that Defendants tortiously interfered with Flowers' last two years of military service (i.e., the additional two years that he says he could have obtained if he retired at 30 years rather than 28 years of service). But nothing the Defendants did in releasing financial records, even assuming a wrongful release, caused Flowers to have to retire early. The early retirement was caused by the larceny charges or other actions of the Army (e.g., the bar to re-enlistment). Flowers has even argued that there was nothing wrong with his financial records and nothing in them to support the larceny charges. That is, he essentially argues that the financial records were helpful to defending himself against the Army's charges. The TIPEA claims fail for lack of causation.

4. First Hawaiian Bank's Motion for Partial Summary Judgment On Claims for Attorneys' Fees.

First Hawaiian Bank seeks a ruling that Plaintiff is not entitled to attorneys' fees as part of his damages. This is a valid argument. Because Flowers is pro se, U.S. Supreme Court case law indicates that he cannot recover attorneys' fees as a prevailing party under 12 U.S.C. § 3417 (a)(4). *See Kay v. Ehrler,* 499 U.S. 432, 435, 113 L. Ed. 2d 486, 111 S. Ct. 1435 (1991) (reasoning that "a pro se litigant who is not a lawyer is not entitled to attorney's fees" in civil rights cases and finding that fees are not appropriate even if the litigant is an attorney).

First Hawaiian Bank also seeks a ruling that even the attorneys fees (if any) incurred when Plaintiffs had an attorney should be limited to the period before March 31, 2003, when First Hawaiian offered to admit to a violation of the RFPA. (First Hawaiian and the Army have filed a stipulation that there was a violation of the RFPA; It was

signed by Judge Chang as a judicial admission.) Any fees for after March 31, 2003 would be unreasonable because fees could not have been incurred to prove liability for an RFPA violation.

This argument is premature. There is no indication that an attorney (such as the prior attorney Charles Brown) has actually sought such fees. Although the argument may have merit, whether attorneys may seek fees under section 3417(a)(4) for any success achieved in this action is not ripe. If such an application is made by an attorney, it can be addressed on a full record.

Therefore, the motion is GRANTED insofar as the Court declares it will follow existing precedent in deciding that pro se litigants are not entitled to attorneys fees as prevailing parties. The motion is DENIED without prejudice as to the remaining relief sought regarding other attorneys fees.

5. First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages (Substantive joinder by Fort Jackson FCU).

The Bank Defendants seek summary judgment on the Flowers' claims for damages (other than the statutory damages of $100 against First Hawaiian Bank). The substantive joinder by Fort Jackson FCU is now moot because the Court has already found that Fort Jackson FCU has no RFPA liability.

First Hawaiian Bank contends that there is no evidence that either Plaintiff (i.e., either Anna or Marshall Flowers) suffered any actual damages. Plaintiffs can point to no evidence of consequential damages from an unauthorized financial disclosure (such as, for example, identity theft or

other tangible adverse financial or tax problems caused by the disclosures). This argument is valid.

Marshall Flowers cannot prove that his allegedly forced retirement had anything to do with the disclosures. The records disclosed appear to be nothing more than bank statements. True, bank statements contain personal information. However, the undisputed evidence is that the Army did not even have the records at the time of the first Article 32 hearing. The information in the records had nothing to do with the decision to prosecute Flowers, to pursue an Article 32, to cause the Army to impose a bar to re-enlistment, or otherwise to cause Flowers to retire early. The Army's determination to begin Article 32 proceedings against Marshall Flowers *preceded* the release of financial records. The Army's recommendation to proceed with a General Court-Martial had nothing to do with the release of records. [*See* CSF 5, Exh. F at 72-74, 92-93; Exh. D, at 97.] Any subsequent discipline the Army imposed had nothing to do with the release of financial records. [*See*, *Id.* Exh. F at 98-100, Exh. D at 79, 86]. There simply is no evidence that any alleged damages could have been caused by First Hawaiian Bank's (or, for that matter, Fort Jackson FCU's) release of financial information. (If anything, the financial information helped him or could have helped him if it is true that there was nothing incriminating in the records as Flowers has argued.)

Similarly, even if the Court accepts for purposes of this motion that Anna or Marshall Flowers suffered emotional distress over the events described here, the undisputed evidence is that any emotional distress type damages would be caused by the prosecution of his claims -- i.e., by the Army's decision to investigate and prosecute violations of the UCMJ or to impose a bar to re-enlistment -- not by First Hawaiian

Bank's release of financial records. Litigation stress is not recoverable as damages. *E.g.*, *Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983); *Picogna v. Bd. of Ed.*, 143 N.J. 391, 671 A.2d 1035, 1038 (N.Y. 1996) ("the majority of courts addressing litigation-induced stress have treated it as a non-compensable component of damages").

For similar reasons as discussed above, there is no reason to postpone proceedings under Fed. R. Civ. P. 56(f) for further discovery into causation. The Court can conceive of no evidence that would create a genuine issue of fact that the financial disclosures by First Hawaiian Bank would have caused the Army to impose a bar to re-enlistment for SGM Flowers, and there is nothing in the present record to indicate as such. There is every indication that the Army's decision to end SGM Flowers' career was independent of the technical RFPA violations. There being no genuine issue of material fact, the Court GRANTS First Hawaiian Bank's Motion for Summary Judgment, insofar as it seeks a finding that Plaintiffs are not entitled to any damages under the RFPA in excess of the statutory damages.

6. Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs have also filed a summary judgment motion seeking a determination that the Defendants are liable under the RFPA. This motion has merit as to First Hawaiian Bank but not as to Fort Jackson FCU as the Court has already determined that Fort Jackson FCU is protected by the litigation exception in 12 U.S.C. § 3413(e).

After the Ninth Circuit's opinion, First Hawaiian Bank filed a stipulation on April 9, 2003 (which the Court has treated as a judicial admission) that it committed a violation of the RFPA. Indeed, First Hawaiian Bank's violation was

mandated by the Ninth Circuit in its *Flowers* opinion. First Hawaiian Bank, however, objects to any entry of judgment in excess of $200, which would represent $100 in favor of each Plaintiff.

The Court therefore GRANTS Plaintiff's motion for partial summary judgment to the extent it asks the Court for a finding of liability on an issue that First Hawaiian Bank has already admitted. There is no issue of fact that First Hawaiian Bank is liable by statute towards Plaintiffs under 12 U.S.C. § 3417(a)(1).[3] The Court therefore GRANTS summary judgment in favor of Plaintiffs and awards damages in the amount of $200 ($100 to each Plaintiff).[4]

CONCLUSION

For the foregoing reasons, judgment shall enter against Plaintiffs and in favor of Defendant Fort Jackson FCU.

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[3] Again, Section 3417(a) provides in pertinent part:

(a) Liability of ... financial institutions

> Any ... financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of--
>
> (1) $100 without regard to the volume of records involved[.]

[4] Although the Court finds that Fort Jackson FCU is protected by section 3417(a), if this finding was incorrect, Plaintiff Marshall Flowers would be entitled to $100 from Fort Jackson FCU. As set forth in an earlier order, Anna Flowers was not an account holder with Fort Jackson FCU.

Judgment shall enter in favor of Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

All other pending matters are DENIED or are MOOT. Because final judgment will enter, Plaintiffs' motion to file an interlocutory appeal (and corresponding ex parte motion to shorten time) is not necessary. Plaintiffs' November 22, 2003, appeal from a September 19, 2003 order of United States Magistrate Judge Chang regarding filing a third amended complaint and to enlarge the time for filing dispositive motions is DENIED. The September 19, 2003 order was neither clearly erroneous nor contrary to law.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 5, 2003.

/s/
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 99-00335SPK/KSC
CIV. NO. 01-412SPK/BMK

[Filed October 31, 2003]

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

JUDGES: SAMUEL P. KING, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING FEDERAL DEFENDANTS' MOTIONS TO DISMISS, AND AFFIRMING IN PART AND REVERSING IN PART THE SEPTEMBER 11, 2003 DISCOVERY ORDER

The federal defendants -- the United States Army and, to the extent they remain in any capacity as named defendants, former Captain (now Major) John Ohlweiler, and Secretary of the Army Thomas White (hereinafter "the government") -- move to dismiss the Second Amended Complaint.

Also at issue are two appeals (one from the government and one from Plaintiffs) under LR 74.1 from the same order of U.S. Magistrate Judge Chang.[1] The appeals essentially become moot as to the government witnesses if the case against the government is dismissed.

The matter was heard on October 31, 2003. For the reasons set forth, the government's motions to dismiss are GRANTED. As to the government's discovery appeal, although the matter appears to be moot, Judge Chang's order

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[1] On September 11, 2003, Judge Chang issued an order allowing Marshall Flowers to reconvene depositions of five persons, including Major Ohlweiler and General Hill, upon certain conditions. The witnesses were deposed earlier, but Marshall Flowers apparently instructed his then-attorney not to attend. Now that he is again proceeding pro se, Marshall Flowers wants to proceed with the depositions. The government objects primarily to allowing another deposition of a four-star General; Flowers objects to the conditions imposed, which include a time limit and allowance of depositions by video or telephone.

is REVERSED to the extent it allows re-deposition of the three Army witnesses. Otherwise, the discovery order is AFFIRMED.

I.

The basic factual background of this case is set forth in this Court's order at *Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993 (D. Haw. 2000) and in the Ninth Circuit's opinion at *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002). Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving a military subpoena during Article 32 investigatory proceedings against then-Sergeant Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded after determining that the Article 32 subpoenas were invalid and that litigation and grand jury exemptions did not apply. *See Flowers*, 295 F.3d at 970-77. After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson Federal Credit Union (Civ. No. 01-412).[2]

The government first contends that the Plaintiffs' claims for damages against the government are barred by the *Feres* doctrine. *See, e.g., Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) ("The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries

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[2] Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson's motion to consolidate.

arise out of or are in the course of activity incident to service.") (quoting *Feres v. United States*, 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1950) (emphasis in original)). After due consideration, the Court concludes that *Feres* requires this Court to dismiss the Plaintiffs' claims against the government.[3]

1. "Incident to Service."

Marshall Flowers cannot dispute that his (and his wife's) claims "arise out of or are in the course of activity incident to service." *Id.* Assuming the truth of the operative complaint's allegations and considering the undisputed evidence in the record, Marshall Flowers was an active duty Sergeant Major in the Army when the financial disclosures took place. That is, he was on active duty when the alleged violations of the RFPA occurred. The relevant disclosures of bank records occurred in the course of, and because of, a military Article 32 proceeding against him investigating charges against him of 42 counts of larceny at military exchanges.

Marshall Flowers retired or resigned from the Army in lieu of facing a general court martial. He filed this civil action after leaving the Army. However, even though he is no longer in the military, *Feres* still applies to the claims that arose while he was on active duty. *See*, e.g., *Jackson v. Brigle*, 17 F.3d 280, 281 (9th Cir. 1994) (barring action brought by former Air Force officer).

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[3] At present, RFPA claims against First Hawaiian and Fort Jackson remain.

2. Right to Financial Privacy Act.

The closer question is whether the *Feres* doctrine should be extended from the Federal Tort Claims Act to bar Marshall's (and his wife's) claims for damages under the RFPA. This appears to be an issue of first impression.

Originally, *Feres* barred negligence claims by military personnel against the government under the FTCA, even though the FTCA is not, by its terms, limited only to civilians. 340 U.S. at 146. Although the doctrine has been criticized, *see, e.g., United States v. Johnson*, 481 U.S. 681, 703, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (Scalia, J., dissenting), the doctrine's logic and rationale have been extended from the FTCA to many other contexts. "Practically any suit that 'implicates the military judgment and decisions' runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Johnson*, 481 U.S. 681, 691, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (1987)). *Feres* is a doctine of "intramilitary immunity." *Hodge*, 107 F.3d 705, 710 (9th Cir. 1997).

The *Feres* doctrine now bars not only claims of negligence, but also intentional torts as well. *See, e.g., Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983).

It bars claims not only against the government, but also claims against individuals. *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-81 (9th Cir. 1991) (recognizing intramilitary immunity for suits between military members based on injuries sustained incident to service).

It bars claims not only against military supervisors, but also against all claims for damages that were "incident to service." *United States v. Stanley*, 483 U.S. 669, 680-81, 97

L. Ed. 2d 550, 107 S. Ct. 3054 (1987). This includes claims against military doctors for medical malpractice. *See, e.g., Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987).

It bars civil rights claims against federal individuals brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). *See Chappell v. Wallace*, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983).

Likewise, it bars 42 U.S.C. § 1983 civil rights claims by national guard personnel against state officers. *See Bowen v. Oistead*, 125 F.3d 800, 803 n.2 (9th Cir. 1997)

It bars Title VII-type discrimination in employment claims under 42 U.S.C. § 2000e-16. *See Hodge*, 107 F.3d at 710 (reasoning that the *Feres* doctrine, as well as the language of section 2000e-16 regarding prohibited employment discrimination against employees of "military departments," bars statutory claims by members of the armed forces).

It bars claims by military members for civil rights conspiracy claims under 42 U.S.C. § 1985(1). *See Mollnow*, 716 F.2d at 631. And it bars similar civil rights claims under 42 U.S.C. § 1985(3). *See Trerice v. Pedersen*, 769 F.2d 1398, 1402 (9th Cir. 1985); *Bois v. Marsh*, 801 F.2d 462, 469, 255 U.S. App. D.C. 248 (D.C. Cir. 1986).

It bars suits under the Public Vessels Act, 46 U.S.C. §§ 781-790. *See Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980).

Further, an intramilitary immunity rationale applies to bar claims by military members under the Americans with Disabilities Act, Age Discrimination in Employment Act, and

the Rehabilitation Act. *See Baldwin v. United States Army*, 223 F.3d 100 (2d Cir. 2000) (barring ADA claims); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991) (ADEA); *Coffman v. Michigan*, 120 F.3d 57 (6th Cir. 1997) (Rehabilitation Act).

Given the range of case law, the Court concludes that*Feres* bars the Flowers' claims for damages here under the RFPA.

Case law provides three justifications for the *Feres* bar. *See Johnson*, 481 U.S. at 688-89. First, "the relationship between the Government and members of its armed forces is distinctively federal in character." *Id.* (citations and internal quotations omitted). "Where a service member is injured incident to service -- that is, because of his military relationship -- it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman." *Id.* (citations and internal quotations omitted). In other words, Congress could not have intended with the FTCA to subject the armed forces to vagaries of local tort law.

Second, the existence of "generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* That is, benefits under the Veterans' Benefits Act essentially preclude additional remedies under the FTCA.

Third, suits by service members against the government for injuries incurred incident to service "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States v. Shearer*, 473 U.S. 52, 59, 87 L. Ed. 2d 38, 105 S. Ct. 3039 (1985). This third rationale -- involvement in military discipline -- is most important for the question

involved here. It makes the *Feres* doctrine applicable "whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces." *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (citations and internal quotations omitted). "The test has been broadly construed to immunize the United States and member of the military from any suit which may intrude in military affairs, second-guess military decisions, or impair military discipline." *Id.* (citations and internal editorial marks omitted).

Marshall Flowers' entire RFPA claim is based upon a subpoena or subpoenas issued to two financial institutions during an Article 32 proceeding investigating charges against him of 42 counts of larceny. Although, after the Ninth Circuit's decision remanding this case -- *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 973 (9th Cir. 2002) -- an Article 32 investigating officer does not have true "subpoena" power over third-parties, the proceeding is certainly an integral part of the military disciplinary process.

Moreover, given that the Ninth Circuit has all but directed a finding that the First Hawaiian Bank account records were disclosed without following the RFPA's procedures, and given the Ninth Circuit's decision that no exemption applies, essentially the only question now remaining on remand is one of damages. The statute allows damages of $100 per disclosure plus actual damages and punitive damages for "willful or intentional" violations. 12 U.S.C. § 3417(a). But, in order to assess any possible damages (which could not have been anything related to Marshall Flowers' allegedly "forced" retirement, which was independent of the financial

disclosures[4]), the Court could be required to examine the nature of the disciplinary investigation, the need for an Article 32 proceeding, the motives and state-of-mind of the investigating authorities in issuing the subpoenas to First Hawaiian Bank and Fort Jackson FCU, and other particulars of the process. The Court would be examining "management, discipline, supervision, and control of members of the armed forces" and certainly might "intrude in military affairs, second-guess military decisions, or impair military discipline." *Zaputil*, 335 F.3d at 887.

This involvement in military affairs and discipline is only exemplified by the pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James T. Hill, a four-star General who is currently commander of the Southern Command during a time of military conflict in Afghanistan and Iraq. (He seeks, among other things, to increase deposition time to several hours and to compel General Hill's attendance in Hawaii.)

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[4] Stated differently, such alleged "damages" were, at best, caused by allegedly improper larceny charges, not by any disclosure of bank records. The disclosures were a result of the investigation, not a cause of his retirement. The disclosure of account information did not cause him to lose his military position. In this regard, Marshall Flowers (and his wife) would be hard pressed to find any actual damages caused by the disclosure. Moreover, given the ambiguities in the state of the law before the Ninth Circuit's decision in *Flowers* regarding the treatment of Article 32 "subpoenas" it appears unlikely that the disclosure could have been "willful" for purposes of assessing punitive damages. *See, e.g., Russell v. Department of the Air Force*, 915 F. Supp. 1108 (D. Colo. 1996) (addressing use under RFPA of financial records obtained during Article 32 proceedings and appearing to treat such subpoenas as proper).

General Hill was the leader of the 25th Infantry Division when the proceedings were ongoing against then-Sergeant Major Flowers. His testimony to date includes reasons for the Article 32, the subsequent recommendation for seeking a general court-martial against Flowers, and some of the reasons for the agreement between Flowers and the Army for Flowers to accept non-judicial punishment (an Article 15) and to seek immediate retirement in lieu of the Army's proceeding with a general court-martial.

In short, *Feres* appears particularly applicable here, where all indications are that Marshall Flowers is entitled to, at most, $100 in damages for each disclosure.

Although no reported case has applied *Feres* to bar a claim for damages under the RFPA, the U.S. Court of Appeals for the District of Columbia Circuit in a 2-1 decision has determined that *Feres* does *not* bar a claim under the Privacy Act, 5 U.S.C. § 552a(b). *See Cummings v. Department of the Navy*, 350 U.S. App. D.C. 68, 279 F.3d 1051 (D.C. Cir. 2002) (finding *Feres* does not bar a Privacy Act claim for damages by a Navy officer alleging unlawful disclosure of a negative flight evaluation).

Cummings, however, relied heavily on specific language of the Privacy Act that "demonstrated that the Congress unambiguously intended to establish a duty that runs from a 'military department' (like the Navy) to military personnel (like [plaintiff]) not to 'disclose any record which is contained in a system of records'." *Id.* at 1054 (referring to 5 U.S.C. §§ 552(f), 552a(g)(1), 552a(k)(5)and 552a(k)(7)). Given this "clear congressional mandate," the D.C. Circuit held that *Feres* "does not extend to Privacy Act lawsuits brought by military personnel against the military departments." *Id.* at 1058. *Cummings* is inconsistent with a decision of the Eighth

Circuit affirming a district court decision that found that the *Feres* doctrine *does* bar, among other things, a Privacy Act claim against the military. *See Uhl v. Swanstrom*, 79 F.3d 751, 756 (8th Cir. 1995) (affirming *Uhl v. Swanstrom*, 876 F. Supp. 1545 (N.D. Iowa 1995)).

In contrast to the Privacy Act, the RFPA itself does not appear to contain such explicit protections for military personnel. At most, a military branch falls within the RFPA's definition of a "government authority." *See* 12 U.S.C. § 3401(3) (defining "Government authority" as "any agency or department of the United States, or any officer, employee, or agent thereof"). There are no other terms in the RFPA specifically mentioning armed services personnel. Moreover, the purpose of the RFPA is different than the Privacy Act. "[T]he focus of the Privacy Act is on the actions of *government* agencies in disclosing personal information maintained by *them* ... In contrast, the RFPA, 12 U.S.C. § 3401 et seq. prohibits *financial institutions* from providing the *government* with information[.]" *Russell*, 915 F. Supp. at 1115-16 (emphasis in original).

Cummings is also distinguishable because it did not involve military disciplinary proceedings to the extent this case does. Rather, in *Cummings*, the suit was based upon the military releasing personnel records (allegedly negative flight evaluations of plaintiff who was a military female pilot) to an author writing about training of fighter pilots. As mentioned, the instant case involves an integral part of the military disciplinary process.

Ruling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages for violations if the violations occurred "incident to

service." A finding against Marshall Flowers does not bar a member of the armed services from an action for violations of the RFPA if the disclosure occurred in other circumstances. It also would not bar claims for damages against private financial institutions such as First Hawaiian Bank or Fort Jackson FCU.

Indeed, the Ninth Circuit did state that the RFPA does apply in general to military personnel. *See Flowers*, 295 F.3d at 971 ("It is not disputed that Sergeant Major Flowers, as a member of the armed services when the circumstances in this case occurred, is protected by the RFPA") (citing *United States v. Dowty*, 48 M.J. 102, 109 (1998)). However, even if the RFPA "protects" Flowers, this does not necessarily mean he should be entitled to damages from the Army. Military members can still seek injunctive relief under the RFPA.[5] *See also McDonough v. Widnall*, 891 F. Supp. 1439 (D. Col. 1995) (enjoining under the RFPA the Air Force's use of financial records in court martial proceedings, where records were obtained without following notice provisions of RFPA, but stating that "the questions whether and what [plaintiff] may recover under the provisions of § 3417(a) remain for another day").

In *Flowers* the Ninth Circuit did not reach whether *Feres* bars damages claims. The government had not even raised the issue until now, and this delay does not waive the *Feres* defense. *See Stauber v. Cline*, 837 F.2d 395, 397-98 (9th Cir. 1988) (reasoning that the *Feres* doctrine is viewed as a

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[5] Flowers does not seek any injunctive relief such as precluding the Army from using financial records against him in the Article 32 proceedings or in court martial proceedings. Those charges have been settled; Marshall Flowers retired.

limitation on subject matter jurisdiction and the defense was not waived by failure to raise it until after trial).

Finally, the government also asserts that Marshall Flowers' wife Anna Flowers, even if she is a civilian, is also barred by *Feres* from damages claims against the government under the RFPA. This position has merit. Her claims are entirely derivative of his claims. They are based on the exact same disclosures. A spouse may not seek derivative damages from the government if those damages result from actions of the military against a service member. *See, e.g., Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981) (rejecting claim of non-military plaintiff seeking recovery for independent injuries stemming from allegedly negligent acts against military personnel). If Marshall Flowers' claims are barred by *Feres*, so are his wife's.

3. Other grounds.

Besides raising the *Feres* issue, the government also seeks dismissal of any claims sounding in tort (e.g., negligent infliction of emotional distress, tortious interference with prospective advantage,[6] violation of a right to privacy) that could be construed as being brought under the Federal Tort Claims Act. The government points out that Flowers has not exhausted administrative remedies for claims under the FTCA as required by 28 U.S.C. § 2675 and § 2401(b). Exhaustion is a jurisdictional prerequisite. Because neither Marshall nor Anna Flowers has exhausted administrative remedies, the

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[6] A claim for interference with contract would be further independently barred under 28 U.S.C. § 2680(h) (excluding from the FTCA, among other claims, any claim arising out of "interference with contract rights").

Court lacks jurisdiction over claims sounding in tort against the government under the FTCA. *United States v. Kubrick*, 444 U.S. 111, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979). Thus, even if the claims were not barred by *Feres*, all claims besides the RFPA claim are also barred by the failure to exhaust.

Moreover, any claim besides an RFPA claim against Major Ohlweiler and Secretary of the Army Thomas E. White, to the extent they are brought against them in their official capacities, are barred by sovereign immunity. *See Brown v. General Serv. Administration*, 425 U.S. 820, 827, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). Similarly, even assuming there were a constitutional right to privacy in bank records,[7] no claim for damages would exist against the individual federal defendants under *Bivens*. *Libas, Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003) ("*Bivens* claims may be expressly precluded 'when Congress has provided an alternative remedy [such as the RFPA] which it explicitly declares to be a substitute for recovery directly under the Constitution and views as equally effective.'").

The government also points out that there can be no independent state law claim for a violation of privacy in bank records under the Hawaii State Constitution. *See State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548, 552 (Haw. 1990) ("we adopt the rule set forth in *United States v. Miller*, and follow the majority of states in finding no reasonable expectation of privacy in personal bank records").

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[7] In an earlier order, the Court has dismissed constitutional right to privacy claims based upon *United States v. Miller*, 425 U.S. 435, 440-43, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976) (finding no reasonable expectation of privacy in bank records).

Lastly, the government raises the three-year statute of limitations in 12 U.S.C. § 3416 as to claims by both Marshall and Anna Flowers against Major Ohlweiler. Apparently, Major Ohlweiler was only added as a party in the Second Amended Complaint on March 28, 2003. One question would be whether claims against him, if they exist, would relate back to when the complaint was filed originally in 1999. The length of time also includes the time that this matter was on appeal to the Ninth Circuit. This issue need not be decided because there can be no claims against Ohlweiler even if the claims did relate back. The statute of limitations issue is moot.

II.

Also at issue is an order of Judge Chang allowing Plaintiffs a renewed opportunity to depose five witnesses, two from Fort Jackson FCU (Velma Jones and Kenneth Creticos) and three from the U.S. Army (General Hill, Major Ohlweiler and Major Bagwell). The order allows Plaintiffs to retake their depositions (which have already been taken by other parties) subject to the following conditions: (1) they must be taken in their respective cities (i.e., not in Hawaii); (2) they must be taken by November 30, 2003; (3) they are limited to two hours; (4) Plaintiffs must reimburse Defendants one-half of costs incurred (including travel costs) in the renewed depositions; and (5) they may be taken by telephone or videoconference.

The Government appeals, contending that Flowers has already had the opportunity to depose the witnesses. Further, especially as to General Hill, the Government contends that Flowers should not be allowed to continue to waste the time of a four-star General. On the other hand, Flowers appeals the conditions placed on the depositions; he seeks more time

to conduct the depositions, to extend the deadline, to remove the reimbursement condition, and to compel witnesses' presence in Hawaii (they are in South Carolina, Washington D.C., and Florida).

Flowers contends that he was not allowed to participate, or he did not allow his lawyer, Mr. Brown, to participate, in the prior depositions because of disputes he was having with Mr. Brown. He has claimed he was "indisposed" previously. Nevertheless, the record reflects that much effort was made to accommodate Mr. Brown in scheduling the depositions and that Marshall Flowers later instructed Mr. Brown not to participate. Mr. Brown told Flowers of the dangers of not participating. Flowers, through his attorney, certainly had a prior opportunity to depose these individuals.

Initially, the appeals appear to be moot as to the government's witnesses. Testimony of the government witnesses would be irrelevant to the only real issue remaining -- that of possible damages to Flowers. Fort Jackson FCU has filed a substantive joinder in the government's appeal. Fort Jackson FCU reiterates the procedural history of how the depositions were scheduled and how Flowers chose not to participate by ordering his attorney not to participate. The Fort Jackson FCU employees presumably are those who had some involvement with receiving the Army subpoenas and disclosing the account information. The only possible relevancy of their testimony would be for punitive damages, if there were some basis to suppose that the disclose was willful and meant to harm Flowers. Nevertheless, the conditions imposed by Judge Chang are reasonable, given that Flowers has had a chance to depose these witnesses previously.

The Court therefore DENIES the appeal of the Plaintiffs objecting to the conditions imposed on any renewed depositions of Fort Jackson FCU employees. The Court GRANTS the government's appeal as to the three Army witnesses. Especially given the dismissal of the government, the testimony of the Army witnesses is irrelevant.

III.

For the foregoing reasons, the Federal Defendants' Motion to Dismiss is GRANTED. The Federal Defendants' appeal of the September 11, 2003 discovery order is GRANTED and the discovery order is REVERSED to the extent it allows redeposition of the three Army members. Plaintiffs' appeal of the September 11, 2003 discovery order is DENIED and the discovery order is AFFIRMED as to the conditions imposed on any further depositions of Fort Jackson FCU employees.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 31, 2003.

/s/
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

APPENDIX N

TITLE 12. BANKS AND BANKING
CHAPTER 35. RIGHT TO FINANCIAL PRIVACY

12 USC § 3401. Definitions

For the purpose of this title, the term--

(1) "financial institution", means any office of a bank, savings bank, card issuer as defined in section 1602(n) of this title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

(6) "holding company" means--

(A) any bank holding company (as defined in section 1841 of this title);

(B) any company described in section 1843(f)(1) of this title; and

(C) any savings and loan holding company (as defined in the Home Owners' Loan Act [12 USCS §§ 1461 et seq.]);".

(7) "supervisory agency" means with respect to any particular financial institution, holding company, or any subsidiary of a financial institution or holding company, any of the following which has statutory authority to examine the financial condition, business operations, or records or transactions of that institution, holding company, or subsidiary--

(A) the Federal Deposit Insurance Corporation;

(B) [the] Director, Office of Thrift Supervision;

(C) the National Credit Union Administration;

(D) the Board of Governors of the Federal Reserve System;

(E) the Comptroller of the Currency;

(F) the Securities and Exchange Commission;

(G) the Commodity Futures Trading Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act [12 USCS §§ 1951 et seq.] and the Currency and Foreign Transactions Reporting Act [31 USCS §§ 5311 et seq.] (Public Law 91-508, title I and II); or

(I) any State banking or securities department or agency; and

(8) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

12 USC § 3402. Access to financial records by Government authorities prohibited; exceptions

Except as provided by section 3403(c), (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and--

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

12 USC § 3403. Confidentiality of records; financial institutions

(a) Release of records by financial institutions prohibited.

No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this title.

(b) Release of records upon certification of compliance with chapter.

A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter.

(c) Notification to Government authority of existence of relevant information in records.

Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation or account involved in and the nature of any suspected illegal activity. Such information may be disclosed notwithstanding any constitution, law, or regulation of any State or political subdivision thereof to the contrary. Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the customer of such disclosure.

(d) Release of records as incident to perfection of security interest, proving a claim in bankruptcy, collecting a debt, or processing an application with regard to a Government loan, loan guarantee, etc.

(1) Nothing in this title shall preclude a financial institution, as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial institution itself or in its role as a fiduciary, from providing copies of any financial record to any court or Government authority.

(2) Nothing in this title shall preclude a financial institution, as an incident to processing an application for assistance to a customer in the form of a Government loan, loan guaranty, or loan insurance agreement, or as an incident to processing a default on, or administering, a Government guaranteed or insured loan, from initiating contact with an appropriate Government authority for the purpose of providing any financial record necessary to permit such authority to carry out its responsibilities under a loan, loan guaranty, or loan insurance agreement.

12 USC § 3404. Customer authorizations

(a) Statement furnished by customer to financial institution and Government authority; contents.

A customer may authorize disclosure under section 3402(1) of this title if he furnishes to the financial institution and to the Government authority seeking to obtain such disclosure a signed and dated statement which--

(1) authorizes such disclosure for a period not in excess of three months;

(2) states that the customer may revoke such authorization at any time before the financial records are disclosed;

(3) identifies the financial records which are authorized to be disclosed;

(4) specifies the purposes for which, and the Government authority to which, such records may be disclosed; and

(5) states the customer's rights under this title.

(b) Authorization as condition of doing business prohibited.

No such authorization shall be required as a condition of doing business with any financial institution.

(c) Right of customer to access to financial institution's record of disclosures.

The customer has the right, unless the Government authority obtains a court order as provided in section 3409 of this title, to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made.

12 USC § 3407. Judicial subpena

A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if--

(1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions which are held by the financial institution named in the

attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and statement by mailing or delivering them to the clerk of the Court.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to.

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer; and

(3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate

court, or the customer challenge provisions of section 3410 of this title have been complied with.

12 USC § 3408. Formal written request

A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if--

(1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought;

(2) the request is authorized by regulations promulgated by the head of the agency or department;

(3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and

(4) (A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:

If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the

records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to.

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and

(B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 1110 [12 USCS § 3410] have been complied with.

12 USC § 3410. Customer challenges

(a) Filing of motion to quash or application to enjoin; proper court; contents.

Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. Such motion or application shall contain an affidavit or sworn statement--

(1) stating that the applicant is a customer of the financial institution from which financial records pertaining to him have been sought; and

(2) stating the applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance with the provisions of this chapter.

Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.

(b) Filing of response; additional proceedings.

If the court finds that the customer has complied with subsection (a), it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.

(c) Decision of court.

If the court finds that the applicant is not the customer to whom the financial records sought by the Government authority pertain, or that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, it shall deny the motion or application, and, in the case of an administrative summons or court order other than a search warrant, order such process enforced. If the court finds that the applicant is the customer to whom the records sought by the Government authority pertain, and that there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, or that there has not been substantial compliance with the provisions of this title, it shall order the process quashed or shall enjoin the Government authority's formal written request.

(d) Appeals.

A court ruling denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer. An appeal of a ruling denying a motion or application under this section may be taken by the customer (1) within such period of time as provided by law as part of any appeal from a final order in any legal proceeding initiated against him arising out of or based upon the financial records, or (2) within thirty days after a notification that no legal proceeding is contemplated against him. The Government authority obtaining the financial records shall promptly notify a customer when a determination has been made that no legal proceeding against him is contemplated. After one hundred and eighty days from the denial of the motion or application, if the Government authority obtaining the records has not initiated such a proceeding, a supervisory official of the Government authority shall certify to the appropriate court that no such determination has been made. The court may require that such certifications be made, at reasonable intervals thereafter, until either notification to the customer has occurred or a legal proceeding is initiated as described in clause (A).

(e) Sole judicial remedy available to customer.

The challenge procedures of this chapter constitute the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this chapter.

(f) Affect on challenges by financial institutions.

Nothing in this title shall enlarge or restrict any rights of a financial institution to challenge requests for records made by a Government authority under existing law. Nothing in this

chapter shall entitle a customer to assert the rights of a financial institution.

12 USC § 3413. Exceptions

(a) Disclosure of financial records not identified with particular customers.

Nothing in this title prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

(b) Disclosure to, or examination by, supervisory agency pursuant to exercise of supervisory, regulatory, or monetary functions with respect to financial institutions, holding companies, subsidiaries, institution-affiliated parties, or other persons.

This chapter shall not apply to the examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions, including conservatorship or receivership functions, with respect to any financial institution, holding company, subsidiary of a financial institution or holding company, institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to a financial institution, holding company, or subsidiary, or other person participating in the conduct of the affairs thereof.

(c) Disclosure pursuant to Title 26.

Nothing in this title prohibits the disclosure of financial records in accordance with procedures authorized by title 26.

(d) Disclosure pursuant to Federal statute or rule promulgated thereunder.

Nothing in this title shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

(e) Disclosure pursuant to Federal Rules of Criminal Procedure or comparable rules of other courts.

Nothing in this title shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

12 USC § 3416. Jurisdiction

An action to enforce any provision of this title may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later.

12 USC § 3417. Civil penalties

(a) Liability of agencies or departments of United States or financial institutions.

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of--

(1) $100 without regard to the volume of records involved;
(2) any actual damages sustained by the customer as a result of the disclosure;
(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Disciplinary action for willful or intentional violation of chapter by agents or employees of department or agency.

Whenever the court determines that any agency or department of the United States has violated any provision of this title and the court finds that the circumstances surrounding the violation raise questions of whether an officer or employee of the department or agency acted willfully or intentionally with respect to the violation, the Director of the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. The Director after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Director recommends.

(c) Good faith defense.

Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this

chapter in good-faith reliance upon a certificate by any Government authority or pursuant to the provisions of section 3413(l) of this title shall not be liable to the customer for such disclosure under this title, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(d) Exclusive judicial remedies and sanctions.

The remedies and sanctions described in this title shall be the only authorized judicial remedies and sanctions for violations of this chapter.

APPENDIX O

FEDERAL REGULATIONS INVOLVED

PART 275—OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS: RIGHTS TO FINANCIAL PRIVACY ACT OF 1978

AUTHORITY: 92 Stat. 3697 et seq. (12 U.S.C. 3401, et seq.)

SOURCE: 45 FR 17576, Mar. 19, 1980, unless otherwise noted. Redesignated at 56 FR 57984, Nov. 15, 1991.

§275.1 Purpose.

This part implements Title 12, U.S.C. section 3401, et seq., Pub. L. 95-630, "Right to Financial Privacy Act of 1978," and prescribes the procedures for the Department of Defense to use to gain access to financial records maintained by financial institutions.

§ 275.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Defense Investigative Service, and the National Security Agency (hereafter referred to as the "DoD Components").

(b) Its provisions apply only to financial records maintained by financial institutions as defined in § 275.6(a).

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

§ 275.3 Policy.

(a) It is the policy of the Department of Defense when obtaining financial records from a financial institution to seek the consent of the customer to whom the record pertains, unless doing so compromises or harmfully delays a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative means of obtaining the records authorized by this part shall be utilized.

(b) The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by military banking contractors located outside of the United States, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in enclosure 5 may be followed in obtaining financial information from these facilities.

[45 FR 17576, Mar. 19, 1980, as amended at 46 FR 29706, June 3, 1981]

§ 275.4 Information requirements.

The report required by § 275.14 of this part is assigned Report Control Symbol DD-COMP(A) 1538.

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

§ 275.5 Responsibilities.

(a) *Heads* of affected *DoD Components* shall:

(1) Follow the procedures outlined in this part when seeking access to financial records.

(2) Establish procedures for implementing this part within the Component.

(3) Established procedures to ensure that the report required by § 275.14 is forwarded to the Defense Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration).

(b) The *Deputy Assistant Secretary of Defense (Administration),* or designee, shall:

(1) Prepare a consolidated DoD annual report required by 12 U.S.C. 3421(b) and § 275.14.

(2) Provide policy guidance to DoD Components to implement this part.

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

§ 275.6 Definitions.

(a) *Financial institution.* Any office of a bank, savings bank, credit card issuer, industrial loan company, trust company, savings and loan, building and loan, homestead association (including cooperative banks), credit union, or consumer finance institution that is located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) *Financial record.* An original, its copy, or information known to have been extracted from the original record held by a financial institution that pertains to a customer's relationship with the financial institution.

(c) *Person.* An individual or a partnership of five or less individuals.

(d) *Customer.* Any person or authorized representative of that person who used or is using any service of a financial institution or for whom a financial institution is acting or has acted as fiduciary for an account maintained in the name of that person.

(e) *Law enforcement office.* Any element of a DoD Component authorized by the Component head to conduct law enforcement inquiries.

(f) *Law enforcement inquiry.* A lawful investigation or official proceeding that inquires into a violation of or failure to comply with a criminal or civil statute, or any rule, regulation, or order issued pursuant thereto.

(g) *Personnel security investigation.* An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigations include investigations of subversive affiliations, suitability information, or hostage situations conducted for the purpose of making personnel security determinations; and also include investigations of allegations that arise subsequent to adjudicative action that require resolution to determine an individual's current eligibility for access to classified information, or assignment or retention in a sensitive position.

(h) *Personnel security element.* Any element of a DoD Component authorized by the Secretary of Defense to conduct personnel security investigations.

§275.7 Requesting basic identifying account information.

(a) A DoD law enforcement office may issue a formal written request for basic identifying account information to a financial institution relevant to a legitimate law enforcement

inquiry. A request may be issued to a financial institution for any or all of the following identifying data:

(1) Name.

(2) Address.

(3) Account Number.

(4) Type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions.

PART 504—OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS

AUTHORITY: 12 U.S.C. 3401 *et seq.*, Pub. L. 95-630, unless otherwise noted.

SOURCE: 46 FR 60195, Dec. 9, 1981, unless otherwise noted.

§ 504.1 General.

(a) *Purpose.* This regulation provides DA policies, procedures, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations or inquiries.

(b) *Applicability and scope.* (1) This regulation applies to all DA investigative activities conducted by the Active Army, the Army National Guard, and the US Army Reserve.

(2) The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by financial institutions located outside of the states or territories of the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in § 504.2(d)(4) will be followed in seeking access to financial information from these facilities.

(3) This regulation applies only to financial records maintained by financial institutions as defined in § 504.1(c)(1).

(c) *Explanation of terms.* For purposes of this regulation, the following terms apply:

(1) *Financial Institution.* Any office of a–

(i) Bank.

(ii) Savings bank.

(iii)Credit card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)).

(iv)Industrial loan company.

(v) Trust company.

(vi)Savings and loan association.

(vii) Building and loan association.

(viii) Homestead association (including cooperative banks).

(ix)Credit union.

(x) Consumer finance institution. This includes only those offices located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(xi) Military banking contractors located outside the States or territories of the United States or the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(2) *Financial record.* An original record, its copy, or information known to have been derived from the original record held by a financial institution, pertaining to a customer's relationship with the financial institution.

(3) *Person.* An individual or partnership of five or fewer individuals. (Per DODD 5400.12.)

(4) *Customer.* Any person or authorized representative of that person–

(i) Who used or is using any service of a financial institution.

(ii) For whom a financial institution is acting or has acted as a fiduciary for an account maintained in the name of that person.

(5) *Law enforcement inquiry.* A lawful investigation or official proceeding that inquires into a violation of, or failure to comply with, a criminal or civil statute or any enabling regulation, rule, or order issued pursuant thereto.

(6) *Army law enforcement office.* Any army element, agency, or unit authorized to conduct investigations under the Uniform Code of Military Justice or Army regulations. This broad definition of, Army law enforcement office includes military police, criminal investigation, inspector general, and military intelligence activities conducting investigations of violations of law or regulation.

(7) *Personnel security investigation.* An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigation includes investigations of subversive affiliations, suitability information, or hostage situations conducted to make personnel security determinations. It also includes investigations of allegations that–

(i) Arise after adjudicative action, and

(ii) Require resolution to determine a person's current eligibility for access to classified information or assignment or retention in a sensitive position. Within DA, personnel security investigations are conducted by the Defense Investigative Service.

(d) *Policy*—(1) *Customer consent.* It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative

means of obtaining the records authorized by this regulation will be used. (See § 504.2 (c) through (g).)

(2) *Access requests.* Except as provided in paragraph (d)(3) of this section and §§ 504.1(f)(1), 504.2(g) and 504.20) Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonably described and the–

(i) Customer has authorized such disclosure (5 504.2(b));

(ii) Financial records are disclosed in response to a search warrant which meets the requirements of § 504.2 (d);

(iii)Financial records are disclosed in response to a judicial subpoena which meets the requirements of § 504.2(e); or

(iv)Financial records are disclosed in response to a formal written request which meets the requirements of § 504.2(f).

(3) *Voluntary information.* Nothing in this regulation will preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying an Army investigative element that such institution, or officer, employee or agent has information which may be relevant to a possible violation of any statute or regulation.

(e) *Authority.* (1) Law enforcement offices are authorized to obtain records of financial institutions per this regulation, except as provided in § 504.2(e).

(2) The head of a law enforcement office, of field grade rank or higher (or an equivalent grade civilian official), is authorized to initiate requests for such records.

(f) *Exceptions and waivers.* (1) A law enforcement office may issue a formal written request for basic identifying account information to a financial institution as part of a legitimate law enforcement inquiry. The request may be issued for any or all of the following identifying data:

(i) Name.

(ii) Address.

(iii)Account number.

(iv)Type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions.

(2) A request for disclosure of the above specified basic identifying data on a customer's account may be issued without complying with the customer notice, challenge, or transfer procedures described in § 504.2. However, if access to the financial records themselves is required, the procedures in § 504.2 must be followed. (A sample format for requesting basic identifying account data is in app. A.)

(3) No exceptions or waivers will be granted for those portions of this regulation required by law. Submit requests for exceptions or waivers of other aspects of this regulation to HQDA(DAPE-HRE), WASH, DC 20310.

§ 504.2 Procedures.

(a) *General.* A law enforcement official seeking access to a person's financial records will, when feasible, obtain the customer's consent. This chapter also sets forth other authorized procedures for obtaining financial records if it is not feasible to obtain the customer's consent. Authorized procedures for obtaining financial records follow. All communications with a US Attorney or a US District Court, as required by this regulation, will be coordinated with the supporting staff judge advocate before dispatch.

(b) *Customer consent.* (1) A law enforcement office or personnel security element may gain access to or a copy of a customer's financial records by obtaining the customer's consent and authorization in writing. (See app. B for a sample format.) Any consent obtained under the provisions of this paragraph must–

(i) Be in writing, signed, and dated.

(ii) Identify the particular financial records being disclosed.

(iii)State that the customer may revoke the consent at any time before disclosure.

(iv)Specify the purpose of disclosure and to which agency the records may be disclosed.

(v) Authorize the disclosure for a period not over 3 months.

(vi)Contain a "Statement of Customer Rights Under the Right to Financial Privacy Act of 1978" (app. B).

(2) Any customer's consent not containing all of the elements listed in paragraph a of this section will not be valid.

(3) A copy of the customer's consent will be made a part of the law enforcement inquiry file.

(4) A certification of compliance with 12 U.S.C. 3401 *et seq.* (app. C), along with the customer's consent, will be provided to the financial institution as a prerequisite to obtaining access to the financial records.

(5) The annual reporting requirements of § 504.2(m) apply to requests made to a financial institution even with the customer's consent.

(c) *Administrative summons or subpoena.* The Army has no authority to issue an administrative summons or subpoena for access to financial records.

(d) *Search warrant.* (1) A law enforcement office may obtain financial records by using a search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure in appropriate cases.

(2) No later than 90 days after the search warrant is served, unless a delay of notice is obtained under § 504.2(i), a copy of the search warrant and the following notice must be mailed to the customer's last known address:

> Records or information concerning your transactions held by the financial institution named in the attached

search warrant were obtained by this (office/agency/unit) on (date) for the following purpose: (state purpose). You may have rights under the Right to Financial Privacy Act of 1978.

(3) Search authorization signed by installation commanders or military judges will not be used to gain access to financial records from financial institutions in any State or territory of the United States.

(4) Access to financial records maintained by military banking contractors in oversea areas or by other financial institutions located on DOD installations outside the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands is preferably obtained by customer consent.

(i) In cases where it would not be appropriate to obtain this consent or such consent is refused and the financial institution is not otherwise willing to provide access to its records, the law enforcement activity may seek access by use of a search authorization. This authorization must be prepared and issued per AR 27-10, Legal Services.

(ii) Information obtained under this paragraph should be properly identified as financial information. It should be transferred only where an official need-to-know exists. Failure to do so, however, does not render the information inadmissable in courts-martial or other proceedings.

(iii)Law enforcement activities seeking access to financial records maintained by all other financial institutions overseas will comply with local foreign statutes or procedures governing such access.

(e) *Judicial subpoena.* Judicial subpoenas–

(1) Are those subpoenas issued in connection with a pending judicial proceeding.

(2) Include subpoenas issued under paragraph 115 of the Manual for Courts-Martial and Article 46 of the Uniform

Code of Military Justice. The servicing staff judge advocate will be consulted on the availability and use of judicial subpoenas. The notice and challenge provisions of 12 U.S.C. 3407 and 3410 will be followed.

(f) *Formal written request.* (1) A law enforcement office may formally request financial records when the records are relevant to a legitimate law enforcement inquiry. This request may be issued only if–

(i) The customer has declined to consent to the disclosure of his or her records, or

(ii) Seeking consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry.

(2) A formal written request will be in a format set forth in appendix D and will–

(i) State that the request is issued under the Right to Financial Privacy Act of 1978 and this regulation.

(ii) Described the specific records to be examined.

(iii)State that access is sought in connection with a legitimate law enforcement inquiry.

(iv)Describe the nature of the inquiry.

(v) Be signed by the head of the law enforcement office or a designee (persons specified in § 504.1(e)(2)).

(3) At the same time or before a formal written request is issued to a financial institution, a copy of the request will be personally served upon or mailed to the customer's last known address unless a delay of customer notice has been obtained under § 504.2(i). The notice to the customer will be–

(i) In a format similar to appendix E.

(ii) Personally served at least 14 days or mailed at least 18 days before the date on which access is sought.

(4) The official who signs the customer notice is designated to receive any challenge from the customer.

(5) The customer will have 14 days to challenge a notice request when personal service is made, and 18 days when service is by mail.

(6) The head of the law enforcement office initiating the formal written request will set up procedures to insure that no access to financial records is attempted before expiration of the above time periods–

(i) While awaiting receipt of a potential customer challenge, or

(ii) While awaiting the filing of an application for an injunction by the customer.

(7) Proper preparation of the formal written request and notice to the customer requires preparation of motion papers and a statement suitable for court filing by the customer. Accordingly, the law enforcement office intending to initiate a formal written request will coordinate preparation of the request, the notice, motion papers, and sworn statement with the supporting staff judge advocate. These documents are required by statute; their preparation cannot be waived.

(8) The supporting staff judge advocate is responsible for liaison with the proper United States Attorney and United States District Court. The requesting official will coordinate with the supporting staff judge advocate to determine whether the customer has filed a motion to prevent disclosure of the financial records within the prescribed time limits.

(9) The head of the law enforcement office (§ 504.2(f)(2)) will certify in writing (see app. C) to the financial institution that such office has complied with the requirements of 12 U.S.C. 3401 *et seq.*–

(i) When a customer fails to file a challenge to access to financial records within the above time periods, or

(ii) When a challenge is adjudicated in favor of the law enforcement office. No access to any financial records will be made before such certification is given.

(g) *Emergency access.* (1) In some cases, the requesting law enforcement office may determine that a delay in obtaining access would create an imminent danger of–

(i) Physical injury to a person,

(ii) Serious property damage, or

(iii)Flight to avoid prosecution. Section 504.2(g)(2)(3) provides for emergency access in such cases of imminent danger. (No other procedures in this regulation apply to such emergency access.)

(2) When emergency access is made to financial records, the requesting official (§ 504.1(e)(2)) will–

(i) Certify in writing (in a format similar to that in app. C) to the financial institution that the provisions of 12 U.S.C. 3401 *et seq.* have been complied with as a prerequisite to obtaining access.

(ii) File with the proper court a signed, sworn statement setting forth the grounds for the emergency access within 5 days of obtaining access to financial records.

(3) After filing of the signed, sworn statement, the official who has obtained access to financial records under this paragraph will–

(i) Personally serve or mail to the customer a copy of the request to the financial institution and the following notice, unless a delay of notice has been obtained under § 504.2(i):

> Records concerning your transactions held by the financial institution named in the attached request were obtained by (office/agency/unit) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: (state with reasonable detail the nature of the law enforcement inquiry). Emergency access to such records was obtained on the grounds that (state grounds).

(ii) Insure that mailings under this section will be by certified or registered mail to the last known address of the customer.

(4) The annual reporting requirements of § 504.2(m) apply to any request for access under this section.

(h) *Release of information obtained from financial institutions*—(1) *Records notice.* Financial records, to include derived information, obtained under 12 U.S.C. 3401 *et seq.* will be marked as follows:

> This record was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq., and may not be transferred to another Federal agency or department outside DOD without prior compliance with the transferring requirements of 12 U.S.C. 3412.

(2) *Records transfer.* (i) Financial records originally obtained under this regulation will not be transferred to another agency or department outside the DOD unless the transferring law enforcement office certifies their relevance in writing. Certification will state that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the Jurisdiction of the receiving agency or department. To support this certification, the transferring office may require that the requesting agency submit adequate justification for its request. File a copy of this certification with a copy of the released records.

(ii) Unless a delay of customer notice has been obtained (§ 504.2(i)), the transferring law enforcement office will, within 14 days, personally serve or mail the following to the customer at his or her last known address–

(A) A copy of the certification made according to § 504.2(h)(2)(i) and

(B) The following notice, which will state the nature of the law enforcement inquiry with reasonable detail:

> Copies of, or information contained in, your financial records lawfully in possession of the Department of the Army have been furnished to (state the receiving

agency or department) pursuant to the Right to Financial Privacy Act of 1978 for (state the purpose). If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974.

(iii)If a request for release of information is from a Federal agency authorized to conduct foreign intelligence or foreign counterintelligence activities (Executive Order 12036) and is for purposes of conducting such activities by these agencies, the information will be released without notifying the customer, unless permission to provide notification is given in writing by the requesting agency.

(iv)Financial information obtained before the effective date of the Financial Privacy Act of 1978 (10 March 1978) may continue to be provided to other agencies according to existing procedures, to include applicable Privacy Act System Notices published in AR 340-21 series.

(3) *Precautionary measures.* Whenever financial data obtained under this regulation is incorporated into a report of investigation or other correspondence, precautions must be taken to insure that–

(i) The report or correspondence is not is not distributed outside of DOD except in compliance with paragraph (h)(2)(ii)(B) of this section.

(ii) The report or other correspondence contains the following warning restriction on the first page or cover:

Some of the information contained herein (cite specific paragraphs) is financial record information which was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq. This information may not be released to another Federal agency or department outside the DOD without compliance with

the specific requirements of 12 U.S.C. 3412 and AR 190-6.

(i) *Delay of customer notice procedures*—(1) *Length of delay*. The customer notice required by formal written request (§ 504.2(g)(3)), emergency access (§ 504.2(g)(3)), and release of information (§ 504.2(h)(2)(iii)) may be delayed for successive periods of 90 days. The notice required for search warrant (§ 504.2(d)(2)) may be delayed for one period of 180 days and successive periods of 90 days.

(2) *Conditions for delay*. A delay of notice may be granted only by a court of competent jurisdiction. This will be done only when not granting a delay in serving the notice would result in–

(i) Endangering the life or physical safety of any person.

(ii) Flight from prosecution.

(iii)Destruction of or tampering with evidence.

(iv)Intimidation of potential witnesses.

(v) Otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same degree as the circumstances in § 504.2(i)(2)(ii) through (iv).

(3) *Coordination*. When a delay of notice is appropriate, the law enforcement office involved will consult with the supporting staff judge advocate to obtain such a delay. Applications for delays of notice should contain reasonable detail.

(4) *After delay expiration*. Upon the expiration of a delay of notice under above and required by–

(i) Section 504.2(d)(1), the law enforcement office obtaining financial records will mail to the customer a copy of the search warrant and the following notice.

Records or information concerning your transactions held by the financial institution named in

> the attached search warrant were obtained by this (agency or office) on (date). Notification was delayed beyond the statutory 90-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning (state with reasonable detail). You may have rights under the Right to Financial Privacy Act of 1978.

(ii) Section 504.2(f)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the process or request and the following notice:

> Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of the court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason). The purpose of the investigation or official proceeding was (state purpose with reasonable detail).

(iii)Section 504.2(g)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the request and the notice required by 8 504.2(g)(3).

(iv)Section 504.2(h)(2), the law enforcement office transferring financial records will serve personally or mail to the customer the notice required by § 504.2(0(3). If the law enforcement office was responsible for obtaining the court order authorizing the delay, such office shall also serve personally or by mail to the customer the notice required in § 504.2(f)(3).

(5) *Annual reports.* The annual reporting requirements of § 504.2(m) apply to delays of notice sought or granted under this paragraph.

(j) *Foreign intelligence and foreign counterintelligence activities.* (1) Except as indicated below, nothing in this regulation applies to requests for financial information in connection with authorized foreign intelligence and foreign counterintelligence activities as defined in Executive Order 12036. Appropriate foreign intelligence and counterintelligence directives should be consulted in these instances.

(2) However, to comply with the Financial Privacy Act of 1978, the following guidance will be followed for such requests. When a request for financial records is made–

(i) A military intelligence group commander, the chief of an investigative control office, or the Commanding General (or Deputy CG), US Army Intelligence and Security Command, will certify to the financial institution that the requesting activity has complied with the provisions of 12 U.S.C. 3403(b).

(ii) The requesting official will notify the financial institution from which records are sought that 12 U.S.C. 3414(a)(3) prohibits disclosure to any person by the institution, its agents, or employees that financial records have been sought or obtained.

(3) The annual reporting requirements shown in § 504.2(m) apply to any request for access under this section.

(k) *Certification.* A certificate of compliance with the Right of Financial Privacy Act of 1978 (app. C) will be provided to the financial institution as a prerequisite to obtaining access to financial records under the following access procedures:

(1) Customer consent (§ 504.2(b)).

(2) Search warrant (§ 504.2(d)).

(3) Judicial subpoena (§ 504.2(e)).

(4) Formal written request (§ 504.2(f)).

(5) Emergency access (§ 504.2(g)).

(6) Foreign intelligence and foreign counterintelligence activities (§ 504.2(j)).

(l) *Penalties*. Obtaining or disclosing financial records or financial information on a customer from a financial institution in violation of the Act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the Act or this regulation may be subject to disciplinary action.

(m)*Right to Financial Privacy Act of 1978 Annual Report (RCS DD-COMP(A)1538)*. (1) Major Army commanders will submit this report to HQDA(DAPE-HRE) concerning requests for financial information from financial institutions. Reports are to include all queries requested or information obtained under the provisions of this regulation by subordinate Army law enforcement offices (as defined in § 504.1(c)(6)). Negative reports will be submitted.

(2) This report is to arrive at HQDA(DAPE-HRE), WASH, DC 20310, not later than 1 February following the calendar year reported.

(3) The annual report will contain the number of–

(i) Requests for access to financial institutions, specifying the types of access and any other information deemed relevant or useful.

(ii) Customer challenges to access and whether they were successful.

(iii)Transfers to agencies outside of the DOD of information obtained under this regulation.

(iv)Customer challenges to the transfer of information and whether they were successful.

(v) Applications for delay of notice, the number granted, and the names of the officials requesting such delays.

(vi) Delay of notice extensions sought and the number granted.

(vii) Refusals by financial institutions to grant access, by category of authorization, such as customer consent or formal written request.

(4) A consolidated Army report will be submitted by HQDA(DAPE-HRE) to the Defense Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration), by 15 February each year.

APPENDIX A TO PART 504—REQUEST FOR BASIC IDENTIFYING ACCOUNT DATA—SAMPLE FORMAT

(Official Letterhead)

(Date)_____

Mr./Mrs._____

Chief Teller (as appropriate), First National Bank, Little Rock, AR 72203.

Dear Mr./Mrs. _____: In connection with a legitimate law enforcement inquiry and pursuant to section 3414(g) of the Right to Financial Privacy Act of 1978, section 3401 et seq., Title 12, United States Code, you are requested to provide the following account information: (name, address, account number, and type of account of any customer or ascertainable group of customers associated with a certain financial transaction or class of financial transactions as set forth in § 504.1(f).

I hereby certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978, that the provisions of the Act have been complied with as to this request for account information.

(Official Signature Block) _____

Under section 3417(c) of the Act, good faith reliance upon this certification relieves your institution and its employees

and agents of any possible liability to the subject in connection with the disclosure of the requested financial records.

APPENDIX B TO PART 504—CUSTOMER CONSENT AND AUTHORIZATION FOR ACCESS—SAMPLE FORMAT

Pursuant to section 3404(a) of the Right to Financial Privacy Act of 1978, I, (name of customer), having read the explanation of my rights on the reverse side, hereby authorize the (name and address of financial institution) to disclose these financial records: (list of particular financial records) to (Army law enforcement office) for the following purpose(s): (specify the purpose(s)).

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than 3 months from the date of my signature.

Date: _____

Signature: _____

(Typed name)

(Mailing address of customer)

STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers, or other financial institutions may give financial information about you to a Federal agency, certain procedures must be followed.

Consent to Financial Records

You may be asked to consent to the financial institution making your financial records available to the Government.

You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only 3 months and your financial institution must keep a record of the instances in which it discloses your financial information.

Without Your Consent

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose. Generally, the Federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The Federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult an attorney before making a challenge to a Federal agency's request.

Exceptions

In some circumstances, a Federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the Federal agency will be required to go to court for permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper. When the reason for the delay of notice no longer exists, you will usually be notified that your records were obtained.

Transfer of Information

Generally, a Federal agency that obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing the transfer is proper and sends a notice to you that your records have been sent to another agency.

Penalties

If the Federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or seek compliance with the law. If you win, you may be repaid your attorney's fee and costs.

Additional Information

If you have any questions about your rights under this law, or about how to consent to release your financial records, please call the official whose name and telephone number appears below:

_____

(Last Name. First Name, Middle Initial) Title (Area Code) (Telephone Number)

_____

(Component activity, address)

APPENDIX C TO PART 504—CERTIFICATE OF COMPLIANCE WITH THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978-SAMPLE FORMAT

(Official Letterhead)

Mr./Mrs. _____,

Manager, Army Federal Credit Union, Fort Ord, CA 93941.

Dear Mr./Mrs._____: I certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978. section 3401 et seq., Title 12, United States Code, that the applicable provisions of that statute have been complied with as to the (customer's consent, search warrant or Judicial subpoena, formal written request, emergency access, as applicable) presented on (date), for the following financial records of (customer's name):

_____

(Describe the specific records)

(Official Signature Block) _____

Pursuant to section 3417(c) of the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

APPENDIX D TO PART 504—FORMAL WRITTEN REQUEST FOR ACCESS—SAMPLE FORMAT

(Official Letterhead)

(Date)_____
Mr./Mrs._____,

President (as appropriate), City National Bank and Trust Company, Altoona, FA 16602.

Dear Mr./Mrs._____: In connection with a legitimate law enforcement inquiry and pursuant to section 3402(5) and section 3408 of the Right to Financial Privacy Act of 1978, section 3401 et seq., Title 12, United States Code, and Army Regulation 190-6, you are requested to provide the following account information pertaining to (identify customer) ;

_____
(Describe the specific records to be examined)

The Army has no authority to issue an administrative summons or subpoena for access to these financial records which are required for (describe the nature or purpose of the inquiry).

A copy of this request was (personally served upon or mailed to) the subject on (date) who has (10 or 14) days in which to challenge this request by filing an application in an appropriate United States district court if the subject desires to do so.

Upon expiration of the above mentioned time period and in the absence of any filing or challenge by the subject, you will be furnished a certification certifying in writing that the applicable provisions of the Act have been complied with prior to obtaining the requested records. Upon your receipt of a Certificate of Compliance with the Right to Financial

Privacy Act of 1978, you will be relieved of any possible liability to the subject in connection with the disclosure of the requested financial records. (Official Signature Block)

APPENDIX E TO PART 504—CUSTOMER NOTICE OF FORMAL WRITTEN REQUEST—SAMPLE FORMAT

(Official Letterhead)

(Date)_____
Mr./Ms._____
1500 N. Main Street, Washington, DC 20314.

Dear Mr./Ms._____: Information or records concerning your transactions held by the financial institution named in the attached request are being sought by the (agency/department) in accordance with the Right to Financial Privacy Act of 1979, section 3401 et seq., Title 12, United States Code, and Army Regulation 190-6; for the following purpose(s):

_____

(List the purpose(s))

If you desire that such records or information not be made available, you must do the following:

a. Fill out the accompanying motion paper and sworn statement or write one of your own–

(l) Stating that you are the customer whose records are being requested by the Government.

(2) Giving the reasons you believe that the records are not relevant or any other legal basis for objecting to the release of the records.

b. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

_____

(List applicable courts)

c. Mail or deliver a copy of your motion and statement to the requesting authority: (give title and address).

d. Be prepared to come to court and present your position in further detail.

You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of (10 days from the date of personal service) (14 days from the date of mailing) of this notice, the records or information requested therein may be made available.

These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer if such transfer is made.

3 Inclosures (see papa------)

(Signature) _____

APPENDIX P

Army Regulation 190-6

Effective 15 February 1982

Military Police

Obtaining Information From Financial Institutions

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Major General. United States Army
The Adjutant General

History. This UPDATE issue is a reprint of the original form of this regulation that was published on 15 January 1982. Since that time no changes have been issued to amend the original. This publication has been reorganized to make it compatible with the Army electronic publishing database. No content has been changed.

Summary. This regulation implements DODD 5400.12, Obtaining Information from Financial Institutions, 6 February 1980; Change 1 to DODD 5400.12, 23 April 1981; and

Section 3401 et seq, Title 12, United States Code, Public Law 95-630, "Right to Financial Privacy Act of 1978." It sets forth policy for the Department of the Army to obtain information on a customer's financial records from a financial institution.

Applicability. See paragraph 1-2.

Proponent and exception authority. Not applicable.

Army management control process. Not applicable.

Supplementation. Supplementation of this regulation is permitted, but is not required. If supplements are issued, HQDA, agencies, and major Army commands will furnish one copy of each supplement to HQDA(DAPE-HRE-EM), WASH DC 20310; other commands will furnish one copy of each to the next higher headquarters.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The proponent agency of this regulation is the Office of the Deputy Chief of Staff for Personnel. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) direct to HQDA (DAPE-HRE) WASH DC 20310.

Distribution. Active Army, A; ARNG, D; USAR, D.

Chapter 1 General

1-1. Purpose

This regulation provides DA policies, procedures, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations or inquiries.

1-2. Applicability

a. This regulation applies to–

(1) All DA investigative activities conducted by the Active Army, the Army National Guard, and the US Army Reserve.

(2) Financial records maintained by financial institutions as defined in paragraph 1-3a.

b. The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by financial institutions located outside of the States or territories of the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in paragraph 2-4d will be followed in seeking access to financial information from these facilities.

1-3. Explanation of terms

For purposes of this regulation, the following terms apply:

a. Financial institution. Any office of a–

(1) Bank.

(2) Savings bank.

(3) Credit card issuer as defined in Section 103 of the Consumers Credit Protection Act (1.5 U.S.C. 1602(n)).

(4) Industrial loan company.

(5) Trust company.

(6) Savings and loan association.

(7) Building and loan association.

(8) Homestead association (including cooperative banks).

(9) Credit union.

(10) Consumer finance institution.

This includes only those offices located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(11) Military banking contractors located outside the States or territories of the United States or the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

b. Financial record. An original record, its copy, or information known to have been derived from the original record held by a financial institution, pertaining to a customer's relationship with the financial institution.

c. Person. An individual or partnership of five or fewer individuals.

d. Customer. Any person or authorized representative of that person–

(1) Who used or is using any service of a financial institution.

(2) For whom a financial institution is acting or has acted as a fiduciary for an account maintained in the name of that person.

e. Law enforcement inquiry. A lawful investigation or official proceeding that inquires into a violation of, or failure to comply with, a criminal or civil statue or any enabling regulation, rule, or order issued pursuant thereto.

f. Army law enforcement office. Any Army element, agency, or unit authorized to conduct investigations under the Uniform Code of Military Justice or Army regulations. This broad definition of Army law enforcement office includes military police, criminal investigation, inspector general, and

military intelligence activities conducting investigations of violations of law or regulation.

g. Personnel security investigation. An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigation includes investigation of subversive affiliations, suitability information, or hostage situations conducted to make personnel security determinations. It also includes investigations of allegations that–

(1) Arise after adjudicative action, and

(2) Require resolution to determine a person's current eligibility for access to classified information or assignment or retention in a sensitive position. With DA, personnel security investigations are conducted by the Defense Investigative Service.

1–4. Policy

a. Customer consent. It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative means of obtaining the records authorized by this regulation will be used; (See paras 2-4 through 2-7.)

b. Access request. Except as provided in c below and paragraphs. 1-6a, 2-7, and 2-10, Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonably described and the–

(1) Customer has authorized such disclosure (para 2-2);

(2) Financial records are disclosed in response to a search warrant which meets the requirements of paragraph 2-4;

(3) Financial records are disclosed in response to a judicial subpoena which meets the requirements of paragraph 2-5; or

(4) Financial records are disclosed in response to a formal written request which meets the requirements of paragraph 2-6.

c. Voluntary information. Nothing in this regulation will preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying an Army investigative element that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation.

1-5. Authority

a. Law enforcement offices are authorized to obtain records of financial institutions per this regulation, except as provided in paragraph 2-5.

b. The head of a law enforcement office, of field grade rank or higher (or an equivalent grade civilian official), is authorized to initiate requests for such records.

1-6. Exceptions and waivers

a. A law enforcement office may issue a formal written request for basic identifying account information to a financial institution as part of a legitimate law enforcement inquiry. The request may be issued for any or all of the following identifying data:

(1) Name.

(2) Address.

(3) Account number.

(4) Type of account of any customer or ascertainable group of customers associated with a financial transaction or class or financial transactions.

b. A request for disclosure of the above specified basic identifying data on a customer's account may be issued without complying with the customer notice, challenge, or transfer procedures described in chapter 2. However, if access to the financial records themselves is required, the procedures in chapter 2 must be followed. (A sample format for requesting basic identifying account data is in app A).

c. No exceptions or waivers will be granted for those portions of this regulation required by law. Submit requests for exceptions for waivers of other aspects of this regulation to HQDA (DAPE-HRE), WASH DC 20310.

Chapter 2 Procedures

2-1. General

A law enforcement official seeking access to a person's financial records will, when feasible, obtain the customer's consent. This chapter also sets forth other authorized procedures for obtaining financial records if it is not feasible to obtain the customer's consent. Authorized procedures for obtaining financial records follow. All communications with a US Attorney or a US District Court, as required by this regulation, will be coordinated with the supporting staff judge advocate before dispatch.

2-2. Customer consent

a. A law enforcement office or personnel security element may gain access to or a copy of a customer's financial records by obtaining the customer's consent and authorization in writing. (See app B for a sample format.) Any consent obtained under the provisions of this paragraph must–

(1) Be in writing, signed, and dated.

(2) Identify the particular financial records being disclosed.

(3) State that the customer may revoke the consent at any time before disclosure.

(4) Specify the purpose of disclosure and to which agency the records may be disclosed.

(5) Authorize the disclosure for a period not over 3 months.

(6) Contain a "Statement of Customer Rights Under the Right to Financial Privacy Act of 1978" (app B).

b. Any customer's consent not containing all of the elements listed in a above will not be valid.

c. A copy of the customer's consent will be made a part of the law enforcement inquiry file.

d. A certification of compliance with 12 U.S.C. 3401 et seq (app C), along with the customer's consent, will be provided to the financial institution as a prerequisite to obtaining access to the financial records.

e. The annual reporting requirements of paragraph 2-13 apply to requests made to a financial institution even with the customer's consent.

2-3. Administrative summons or subpoena

The Army has no authority to issue an administrative summons or subpoena for access to financial records.

2-4. Search warrant

a. A law enforcement office may obtain financial records by using a search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure in appropriate cases.

b. No later than 90 days after the search warrant is served, unless a delay of notice is obtained under paragraph 2-9, a copy of the search warrant and the following notice must be mailed to the customer's last known address:

"Records or information concerning your transaction held by the financial institution named in the attached search warrant were obtained by this (office/agency/unit) on (date) for the following purpose: (state purpose). You may have rights under the Right to Financial Privacy Act of 1978."

c. Search authorizations signed by installation commanders or military judges will not be used to gain access to financial records from financial institutions in any State or territory of the United States.

d. Access to financial records maintained by military banking contractors in oversea areas or by other financial institutions located on DOD installations outside the United States, Puerto Rico, The District of Columbia, Guam, American Samoa, or the Virgin Islands is preferably obtained by customer consent.

(1) In cases where it would not be appropriate to obtain this consent or such consent is refused and the financial institution is not otherwise willing to provide access to its records, the law enforcement activity may seek access by use of a search authorization. This authorization must be prepared and issued per AR 27-10.

(2) Information obtained under this paragraph should be properly identified as financial information. It should be transferred only where an official need-to-know exists. Failure to do so, however, does not render the information inadmissible in courts-martial or other proceedings.

(3) Law enforcement activities seeking access to financial records maintained by all other financial institutions overseas will comply with local foreign statutes or procedures governing such access.

2-5. Judicial subpoena

Judicial subpoena–

a. Are those subpoenas issued in connection with a pending judicial proceeding.

b. Include subpoenas issued under paragraph 115 of the Manual for Courts-Martial and Article 46 of the Uniform Code of Military Justice. The servicing staff judge advocate will be consulted on the availability and use of judicial subpoenas. The notice and challenge provisions of 12 USC 3407 and 3410 will be followed.

2-6. Formal written request

a. A law enforcement office may formally request financial records when the records are relevant to a legitimate law enforcement inquiry. This request may be issued only if–

(1) The customer has declined to consent to the disclosure of his or her records, or

(2) Seeking consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry.

b. A formal written request will be a format set forth in appendix D and will–

(1) State that the request is issued under the Right to Financial Privacy Act of 1978 and this regulation.

(2) Describe the specific records to be examined.

(3) State that access is sought in connection with a legitimate law enforcement inquiry.

(4) Describe the nature of the inquiry.

(5) Be signed by the head of the law enforcement office or a designee (persons specified in para 1-5b).

c. At the same time or before a formal written request is issued to a financial institution, a copy of the request will be personally served upon or mailed to the customer's last known address unless a delay of customer notice has been

obtained under paragraph 2-9. The notice to the customer will be–

(1) In a format similar to appendix E.

(2) Personally served at least 14 days or mailed at least 18 days before the date on which access is sought.

d. The official who signs the customer notice is designated to receive any challenge from the customer.

e. The customer will have 14 days to challenge a notice request when personal service is made, and 18 days when service is by mail.

f. The head of the law enforcement office initiating the formal written request will set up procedures to insure that no access to financial records is attempted before expiration of the above time : periods–

(1) While awaiting receipt of a potential customer challenge, or

(2) While awaiting the filing of an application for an injunction by the customer.

g. Proper preparation of the formal written request and notice to the customer requires preparation of motion papers and a statement suitable for court filing by the customer. Accordingly, the law enforcement office intending to initiate a formal written request will coordinate preparation of the request, the notice, motion papers, and sworn statement with the supporting staff judge advocate. These documents are required by statute, their preparation cannot be waived.

h. The supporting staff judge advocate is responsible for liaison with the proper United States Attorney and United States District Court. The requesting official will coordinate with the supporting staff judge advocate to determine whether the customer, has filed a motion to prevent disclosure of the financial records within the prescribed time limits.

i. The head of the law enforcement office (pars 2-6b(5)) will certify in writing (see app C) to the financial institution

that such office has complied with the requirements of 12 U.S.C. 3401 et seq–

(1) When a customer fails to file a challenge to access to financial records within the above time periods, or

(2) When a challenge is adjudicated in favor of the law enforcement office.

No access to any financial records will be made before such certification is given.

2-7. Emergency access

a. In some cases, the requesting law enforcement office may determine that a delay in obtaining access would create an imminent danger of–

(1) Physical injury to a person,

(2) Serious property damage, or

(3) Flight to avoid prosecution.

Paragraphs b and c below provide for emergency access in such cases of imminent danger. (No other procedures in this regulation apply to such emergency access.)

b. When emergency access is made to financial records, the requesting Official (para 1-5) will–

(1) Certify in writing (in a format similar to that in app C) to the financial institution that the provisions of 12 U.S.C. 3401 et seq. have been complied with as prerequisite to obtaining access.

(2) File with the proper court a signed, sworn statement setting forth the grounds for the emergency access within 5 days of obtaining access to financial records.

c. After filing of the signed, sworn statement, the official who has obtained access to financial records under this paragraph will-

(l) Personally serve or mail to the customer a copy of the request to the financial institution and the following notice,

unless a delay of notice has been obtained under paragraph 2-9:

> "Records concerning your transactions held by the financial institution named in the attached request were obtained by (office/agency/ unit) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: (state with reasonable detail the nature of the law enforcement inquiry). Emergency access to such records was obtained on the grounds that (state grounds)."

(2) Insure that mailings under this paragraph will be by certified or registered mail to the last known address of the customer.

d. The annual reporting requirements of paragraph 2-13 apply to any request for access under this paragraph.

2-8. Release of Information obtained from financial Institutions

a. Records notice. Financial records, to include derived information, obtained under 12 U.S.C. 3401 et seq. will be marked as follows:

> "This record was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C., 3401 et seq., and may not be transferred to another Federal agency or department outside DOD without prior compliance with the transferring requirements of 12 U.S.C. 3412."

b. Records transfer.

(1) Financial records originally obtained under this regulation will not be transferred to another agency or

department outside the DOD unless the transferring law enforcement office certifies the relevance in writing. Certification will state that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. To support this certification, the transferring office may require that the requesting agency submit adequate justification for its request. File a copy of this certification with a copy of the released records.

(2) Unless a delay of customer notice has been obtained (pars 2-9), the transferring law enforcement office will, within 14 days, personally serve or mail the following to the customer at his or her last known address:

(a) A copy of the certification made according to (1) above.

(b) The following notice, which will state the nature of the law enforcement inquiry with reasonable detail:

> "Copies of, or information contained in, your financial records lawfully in possession of the Department of the Army have been furnished to (state the receiving agency or department) pursuant to the Right to Financial Privacy Act of 1978 for (state the purpose). If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974."

(3) If a request for release of information is from a Federal agency authorized to conduct foreign intelligence or foreign counterintelligence activities (Executive Order 12036) and is for purposes of conducting such activities by these agencies, the information will be released without notifying the customer, unless permission to provide notification is given in writing by the requesting agency.

(4) Financial information obtained before the effective date of the Financial Privacy Act of 1978 (10 March 1978) may continue to be provided to other agencies according to existing procedures, to include applicable Privacy Act System Notices published in AR 340–21 series.

c. Precautionary measures. Whenever financial data obtained under this regulation are incorporated into a report of investigation or other correspondences, precautions must be taken to insure that–

(1) The report or correspondence is not distributed outside of DOD except in compliance with b above.

(2) The report or other correspondence contains the following warning restriction on the first page or cover:

> "Some of the information contained herein (cite specific paragraphs) is financial record information which was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq. This information may not be released to another Federal agency or department outside the DOD without compliance with the specific requirements of 12 U.S.C. 3412 and AR 190–6."

2-9. Delay of customer notice procedures

a. Length of delay. The customer notice required by formal written request (para 2-6c), emergency access (para 2-7c), and release of information (para 2-8b)(2)) may be delayed for successive periods of 90 days. The notice required for search warrant (pars 2-4b) may be delayed for one period of 180 days and successive periods of 90 days.

b. Conditions for delay. A delay of notice may be granted only by a court of competent jurisdiction. This will be done when not granting a delay in serving the notice would result in–

(1) Endangering the life or physical safety of any person.

(2) Flight from prosecution.

(3) Destruct/on of or tampering with evidence.

(4) Intimidation of potential witnesses.

(5) Otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same degree as the circumstances in (1) through (4) above.

c. Coordination. When a delay of notice is appropriate, the law enforcement office involved will consult with the supporting staff judge advocate to obtain such a delay. Applications for delay of notice should contain reasonable detail.

d. After delay expiration. Upon the expiration of a delay of notice under a above and required by–

(1) Paragraph 2-4b, the law enforcement office obtaining financial records will mail to the customer a copy of the search warrant and the following notice:

> "Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or office) on (date). Notification was delayed beyond the statutory 90-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning (state with reasonable detail). You may have rights under the Right to Financial Privacy Act of 1978."

(2) Paragraph 2-6c, the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the process or request and the following notice:

"Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the Government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of the court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason.) The purpose of the investigation or official proceeding was (state purpose with reasonable detail)."

(3) Paragraph 2-7c, the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the request and the notice required by paragraph 2-7c.

(4) Paragraph 2-8b, the law enforcement office transferring financial records will serve personally or mail to the customer the notice required by paragraph 2-8b(2). If the law enforcement office was responsible for obtaining the court order authorizing the delay, such office shall also serve personally or by mail to the customer the notice required in paragraph 2-6c.

e. Annual report. The annual reporting requirements of paragraph 2-13 apply to delays of notice sought or granted under this paragraph.

2-10. Foreign Intelligence and foreign counterintelligence activities

a. Except as indicated below, nothing in this regulation applied to requests for financial information in connection with authorized foreign intelligence and foreign counterintelligence activities as defined in Executive Order 12036. Appropriate foreign intelligence and counterintelligence directives should be consulted in these instances.

b. However, to comply with the Financial Privacy Act of 1978, the following guidance will be followed for such requests. When a request for financial records is made–

(1) A military intelligence group commander, the chief of an investigative control office, or the Commanding General (CG) (or Deputy CO), US Army Intelligence and Security Command will certify to the financial institution that the requesting activity has complied with the provisions of 12 U.S.C. 3403(b).

(2) The requesting office will notify the financial institution from which records are sought that 12 U.S.C. 3414(a)(3) prohibits disclosure to any person by the institution, its agents, or employees that financial records have been sought or obtained.

c. The annual reporting requirements shown in paragraph 2-13 apply to any request for access under this paragraph.

2-11. Certification

A certificate of compliance with the Right to Financial Privacy Act of 1978 (app C) will be provided to the financial institution as a prerequisite to obtaining a customers financial records under the following access procedures:

a. Customer consent (para 2-2).

b. Search warrant (para 2-4).

c. Judicial subpoena (para 2-5).

d. Formal written request (para 2-6).

e. Emergency access (para 2-7).

f. Foreign intelligence and foreign counterintelligence activities (para 2-10).

2-12. Penalties

Obtaining or disclosing financial records or financial information on a customer from a financial institution in

violation of the act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary action.

2-13. Right to Financial Privacy Act of 1978 Annual Report (RCS DD-COMP(A) 1538)

a. Major Army commanders will submit this report to HQDA (DAPE-HRE) concerning requests for financial information from financial institutions. Reports are to include all queries requested or information obtained under the provisions of this regulation by subordinate Army law enforcement offices (as defined in para 1-3*f*). Negative reports will be submitted.

b. This report is to arrive at HQDA(DAPE-HRE), WASH DC 20310, not later than 1 February following the calendar year period.

c. The annual report will contain the number of–

(1) Requests for access to financial institutions, specifying the types of access and any other information deemed relevant or useful.

(2) Customer challenges to access and whether they were successful.

(3) Transfers to agencies outside of the DOD of information obtained under this regulation.

(4) Customer challenges to the transfer of information and whether they were successful.

(5) Applications for delay of notice, the number granted, and the names of the officials requesting such delays.

(6) Delay of notice extensions sought and the number granted.

(7) Refusals by financial institutions to grant access, by category of authorization, such as customer consent or formal written request.

d. A consolidated Army report will be submitted by HQDA (DAPE-HRE) to the Defence Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration), by 15 February each year.